MAZZARELLA ▪ CALDARELLI LLP
Michael D. Fabiano (SBN 167058)
550 West C Street, Suite 700
San Diego, California 92101
(619) 238-4900 Telephone
(619) 238-4959 Facsimile
mfabiano@mazzcal.com

Attorneys for Defendant
THE VONS COMPANIES, INC.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CHRIS KOHLER, Plaintiff, vs. THE VONS COMPANIES, INC., dba VONS #2360, Defendant.	Case No.: '08 CV 0082 IEG (RBB) **APPENDIX OF CASES IN SUPPORT OF OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEY FEES** **Hearing Date: May 5, 2008** **Time: 10:30 a.m.** **Courtroom: 1**

Defendant The Vons Companies, Inc. ("Vons") hereby provides copies of the following Westlaw and Lexis cases cited in support of Vons' Opposition to Plaintiff's Chris Kohler's Motion for Attorneys' Fees:

EXHIBIT 1:

Chapman v. Pier 1 Imports, Inc., 2007 WL 2462084 (E.D. Cal. Aug. 24, 2007).

EXHIBIT 2:

Loskot v. USA Gas Corporation et al., 2004 U.S. Dist. Lexis 29174 (E.D. Cal. April 26, 2004).

EXHIBIT 3:

Martinez v. G. Maroni Co. et al., 2007 WL 1302739 (E.D. Cal. May 2, 2007).

EXHIBIT 4:

Martinez v. Thrifty Payless, Inc., 2006 WL 279309 (E.D. Cal. Feb. 6, 2006).

EXHIBIT 5:

White v. J.A. Sutherland, Inc. dba Taco Bell #2463 et al., 2005 WL 1366487 (E.D. Cal. May 6, 2005).

Dated: April 14, 2008

MAZZARELLA ■ CALDARELLI LLP

By: /s/ Michael D. Fabiano
MICHAEL D. FABIANO
Attorneys for Defendant
THE VONS COMPANIES, INC.

EXHIBIT A

Chapman v. Pier 1 Imports, Inc.
E.D.Cal.,2007.
Only the Westlaw citation is currently available.
United States District Court,E.D. California.
Bryon CHAPMAN, Plaintiff,
v.
PIER 1 IMPORTS, INC., et al, Defendants.
No. CIV. S-04-1339 LKK/DAD.

Aug. 24, 2007.

Lynn Hubbard, Law Offices of Lynn Hubbard III, Chico, CA, for Plaintiff.
Heather Burror, Akin Gump Strauss Hauer and Feld LLP, San Francisco, CA, Roland M. Juarez, Akin Gump Strauss Hauer and Feld, Dallas, TX, Chelsea Dawn Munday, Akin Gump Strauss Hauer and Feld LLP, Los Angeles, CA, Daniel M. Steinberg, Trainor Fairbrook, Sacramento, CA, for Defendants.

ORDER

LAWRENCE K. KARLTON, Senior Judge.
*1 Pending before the court is plaintiff's motion for an award of attorneys' fees and costs in the amount of $70,608.80. The court decides the matter based upon the parties' papers without oral argument. For the reasons set forth below, the court awards $47,912 .04 in fees and costs.

I. Procedural History

Plaintiff Byron Chapman brought suit against defendants Pier 1 Imports (U.S.) d/b/a Pier 1 Imports # 1132 and R/M Vacaville Ltd. pursuant to the Americans with Disabilities Act and various state laws. Plaintiff alleged that he encountered a number of architectural barriers at the Pier 1 store.

On September 14, 2005, defendant R/M Vacaville Ltd. was dismissed. On June 19, 2007, the parties stipulated to entry of judgment. The court agreed to this stipulation and granted an entry of judgment in favor of plaintiff and against defendant on June 25, 2007. The court also granted injunctive relief and monetary damages in the amount of $8,000.

Plaintiff now seeks attorneys' fees under the ADA and state law. Because the court finds that plaintiff is entitled to attorneys' fees and costs under the ADA, the court does not address the standards for an award under California law.

II. Standard

The ADA provides that "the court ... in its discretion, may allow the prevailing party ... a reasonable attorney's fee, including litigation expenses, and costs."42 U.S.C. § 12205. The propriety of awarding attorneys' fees turns on three elements: (1) whether the party who seeks attorneys' fees is the prevailing party; (2) whether the court should exercise its discretion to award the fees; and (3) what constitutes a reasonable award.

A prevailing party is one who has "succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."*Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (citations and internal quotation marks omitted). A party achieves prevailing party status by establishing a "clear, causal relationship between the litigation brought and the practical outcome realized."*Rutherford v. Pitchess*, 713 F.2d 1416, 1419 (9th Cir.1983) (citations and internal quotation marks omitted).

Although the attorneys' fees provision is stated in discretionary terms, a prevailing plaintiff should ordinarily recover attorneys' fees unless special circumstances would render such an award unjust. *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134 (9th Cir.2002) (citing *Hensley*, 461 U.S. at 429).

The starting point for calculating the amount of a reasonable fee is the number of hours reasonably expended multiplied by a reasonable hourly rate.*Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1119 (9th Cir.2000) (citing *Hensley*, 461 U.S. at 433). This lodestar figure is presumptively reasonable and should only be enhanced or reduced in "rare and exceptional cases." *Id.* (quoting *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986)). The court may, however, adjust the lodestar figure if various factors overcome the presumption of reasonableness. *Hensley*, 461 U.S. at 433-34. The court may adjust the lodestar figure on the basis of the *Kerr* factors:
*2 (1) the time and labor required, (2) the novelty and

difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Morales v. City of San Rafael, 96 F.3d 359, 364 n. 8 (9th Cir.1996) (quoting *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir.1975)) [FN1]; *see also Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1158 (9th Cir.2002) ("The court need not consider all ... factors, but only those called into question by the case at hand and necessary to support the reasonableness of the fee award .").

FN1. Before the lodestar method developed, *Kerr'* s twelve factors constituted the test for setting attorneys' fee awards in the Ninth Circuit. *See Kerr*, 526 F.2d at 70. At present, the court uses some of the *Kerr* factors in deciding the reasonableness of the hours billed and the hourly rate. *Fischer*, 214 F.3d at 1119 & n .3; *see also Morales*, 96 F.3d at 364 n. 9 (listing the *Kerr* factors subsumed in the initial lodestar calculation).

III. Analysis

Plaintiff requests $70,608.80 in attorneys' fees and costs. For the reasons discussed herein, the court awards $47,912.04.

A. Prevailing Party

It is undisputed that plaintiff is the prevailing party in this action, given that judgment was stipulated and consequently entered in his favor.

B. Discretion

A prevailing plaintiff should ordinarily recover attorneys' fees unless special circumstances would render such an award unjust. *Barrios*, 277 F.3d at 1134. Here, defendant argues that because plaintiff prevailed on less than a third of the violations initially raised, the request for attorneys' fees should accordingly be reduced by two-thirds.

Where a plaintiff only succeeds on some of the claims brought, the district court must engage in a two-part analysis. *See Schwartz v. Sec'y of Health and Human Servs.*, 73 F.3d 895, 901-02 (9th Cir.1995). First, the court must determine if the unsuccessful claims were related to the successful claims. *Id.* at 901. If the successful and unsuccessful claims involve "distinctly different claims for relief that are based on different facts and legal theories," fees may not be awarded for time spent on the unsuccessful claims. *Id.* (internal quotation marks omitted).

If the successful and unsuccessful claims "involve a common core of facts or [are] based on related legal theories," however, the court must proceed to the second part of the analysis. *Id.* (internal quotation marks omitted). Under this second step, the court must "focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.* (internal quotation marks omitted). "If the plaintiff obtained 'excellent results,' full compensation may be appropriate, but if only 'partial or limited success' was obtained, full compensation may be excessive." *Id.* at 902.

*3 Here, plaintiff's successful and unsuccessful claims were related, as they all pertained to alleged accessibility violations and therefore shared "related legal theories." *Schwartz*, 73 F.3d at 901; *see also Hubbard v. Twin Oaks Health and Rehabilitation Ctr.*, 406 F.Supp.2d 1096, 1100 (E.D.Cal.2005). Accordingly, the court must determine the overall relief obtained in relation to the hours reasonably expended. On summary judgment, the court ruled on a total of twenty-two alleged violations. Plaintiff prevailed on seven of the alleged violations, whereas defendant prevailed on twelve of the alleged violations (with the remainder of the violations involving factual disputes inappropriate for summary judgment). Plaintiff notes, however, that (1) he succeeded in forcing defendant to eradicate existing architectural barriers, (2) defendant ultimately chose to settle rather than proceed to trial, and (3) Mr. Chapman received damages in the amount of $8,000.

In light of the plaintiff's mixed success, the court finds that some reduction in the award is appropriate. While the defendant has urged that the court essentially pro rate the award by the number of successful claims to total claims, this approach is only appropriate when the successful and unsuccessful claims are unrelated, which is not the case here. Otherwise, the two-part test would be rendered superfluous. Rather, the court finds that it is appropriate to reduce the final attorneys' fees award by 15 percent, given plaintiff's partial success.

C. Reasonable Fee

The starting point for calculating the amount of a reasonable fee is the number of hours reasonably expended multiplied by a reasonable hourly rate. *See* Hensley, 461 U.S. at 433.

1. Reasonableness of Hours Billed

Plaintiff seeks to recover attorneys' fees for a total of 278.95 hours expended in this litigation. Of those total hours, 153.10 are attributed to Lynn Hubbard, the individual with the highest billing rate. Defendant argues that this latter figure should be reduced (or the billing rate adjusted) because some of his time "could have-and should have been-managed more efficiently by having less senior associates handle a substantial portion of the work."*Doran v. Vicorp Restaurants, Inc.,* 407 F.Supp.2d 1120, 1124-25 (C.D.Cal.2005). For example, defendant argues that time spent on discovery, "boilerplate" motions, and site inspections could have been delegated to less senior associates.

The staffing and division of labor undertaken by plaintiff's lawyers, however, appears reasonable. As an initial matter, some of the tasks that defendant argues could have been delegated to a more junior associate involve fairly significant duties, such as drafting an opposition to a motion for summary judgment. Furthermore, even if Lynn Hubbard were to delegate less substantive assignments, such as those involving discovery, to more junior associates, he would presumably need to nevertheless review their work. It is not clear that the savings of cheaper junior associates would outweigh the cost involved in reviewing and supervising the junior associates' labor. Finally, plaintiff is represented by a small law firm. With a limited number of lawyers, it may simply be impractical to staff tasks with perfect efficiency.

2. Reasonable Hourly Rate

*4 The court determines the reasonable hourly rate "according to the prevailing market rates in the relevant community,"*Blum v. Stenson,* 465 U.S. 886, 895, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984), which is typically the one in which the district court sits, *Davis v. Mason County,* 927 F.2d 1473, 1488 (9th Cir.1991), *overruled on other grounds by Davis v. City & County of San Francisco,* 976 F.2d 1536 (9th Cir.1992), *vacated in part on other grounds,*984 F.2d 345 (9th Cir.1993). The party moving for attorneys' fees "has the burden of producing satisfactory evidence, in addition to the affidavits of its counsel, that the requested rates are in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation."*Jordan v. Multnomah County,* 815 F.2d 1258, 1263 (9th Cir.1987) (citing *Blum,* 465 U.S. at 895-97 & n. 11).

Plaintiff seeks a raise in the hourly rate awarded to ADA attorneys in the Eastern District of California. Plaintiff asks the court award fees of $300 per hour for lead counsel Lynn Hubbard, $225 per hour for attorney Steven Wedel, $175 per hour for attorney Scottlynn Hubbard, $150 per hour for attorney Mark Emmett, and $90 per hour for paralegals. As recently as June 20, 2007 in a separate ADA case, the court awarded fees at the rate of $250 per hour for Lynn Hubbard, $150 per hour for Scottlynn Hubbard, $150 per hour for Mark Emmett, and $75 per hour for paralegals. *Wilson v. Haria and Gogri Corp.,* No. Civ. S-05-1239 (E.D.Cal. Jun. 20, 2007). Plaintiff has renewed the same arguments made in that case here.

To support his request for an increase in the hourly rates, plaintiff cites (in his reply) a statistic from the United States Department of Labor that inflation has increased 25% nationwide since 1998. Apart from the fact that defendant has not had a fair opportunity to respond to this information, the statistic is insufficient to show that in this district-the relevant location for determining reasonable hourly rates-there was a similar increase in inflation and a corresponding increase in the prevailing market rates for ADA attorneys.

Prevailing rates for ADA litigation in Sacramento are $250 per hour for an experienced attorney, $150 for an associate, and $75 for a paralegal. *See, e.g., Martinez v. G. Maroni Co.,* No. Civ. S-06-1399, 2007 WL 1302739, at *2 (E.D.Cal. May 2, 2007) (awarding Lynn Hubbard $250 per hour and his associate $150); *Martinez v. Thrifty Payless, Inc.,* No. 2:02-CV-0745, 2006 WL 279309, at *3 (E.D.Cal. Feb.6, 2006) (awarding Lynn Hubbard $250 per hour and Scott Hubbard $150). Accordingly, the court will apply the hourly rates of $250 for Lynn Hubbard, $150 for Scott Hubbard, Mark Emmett, and Steven Wedel, and $75 for paralegals.

3. Travel Time

Defendant also argues that plaintiff should not be allowed to recover 18 hours of travel time because plaintiff's counsel chose to base their law offices out of Chico, rather than Sacramento. "Other judges of this court have held that the defendant is not required to shoulder [Hubbard's] travel expenses to and from Sacramento because Hubbard has filed hundreds of cases in Sacramento and it appears that he maintains his office in Chico for his own convenience."*Martinez*, 2005 WL 3287233, *5 (internal quotation marks omitted). Taken to its logical extreme, however, travel time would never be compensable under this reasoning, because an attorney could simply move into office space adjacent to the courthouse to minimize travel costs. While the Hubbards may have an expansive ADA practice in this court, the court should avoid questioning the propriety of where attorneys choose to set up office. Accordingly, the court awards attorneys' fees attributable to travel time.

4. Lodestar adjustment

*5 The lodestar figure is presumptively reasonable and should only be enhanced or reduced in "rare and exceptional cases." *Fischer*, 214 F.3d at 1119. The parties have not argued that this is a rare or exceptional case. Accordingly, the court awards plaintiff's counsel the lodestar amount.

5. Litigation Expenses and Costs

The ADA provides that the prevailing party may recover litigation expenses and costs in addition to attorneys' fees. 42 U.S.C. § 12205. Plaintiff requests a total of $8,334.30 in costs and other expenses, which includes filing and service of process fees, site reports, and overnight and courier services, among other litigation expenses.

a. Expert Fees

Defendant argues that costs pertaining to expert fees should be denied. In addition to attorneys' fees, the ADA authorizes "litigation expenses and costs".42 U.S.C. § 12205. "Expert witness fees are to be included in the term 'litigation expenses' in ADA cases."*Jones v. Eagle-North Hills Shopping Centre, L.P.*, 478 F.Supp.2d 1321, 1329 (E.D.Okla.2007). Here, plaintiff seeks $4,066.25 for an expert report and $454.10 for a preliminary site report.

First, with regard to the preliminary report, defendant argues that it was superceded by the subsequent expert report and that the cost of the preliminary report should not be permitted. *See Martinez v. Long Drug Stores, Inc.*, 2005 WL 3287233, *6 (E.D.Cal. Nov.28, 2005) (declining to award fees for preliminary report that was superceded by subsequent report). Second, defendant argues that $2,328.75 of the cost of the expert report should be rejected because it was related to architectural drawings that were unnecessary to the litigation. Because plaintiff has wholly failed to respond to either of these points, the court declines to award fees for the preliminary report and the portion of the expert report described above.

b. Overnight Mail

Defendant argues that plaintiff should not be entitled to $150.79 attributable to overnight mail expenses and instead maintans that regular U.S. mail would have been sufficient. Given the relatively small sum of money expended on overnight mail, however, it does not appear that plaintiff abused this practice. Accordingly, the court finds that costs attributable to overnight mail may be properly awarded.

c. Duplicative Fees

Defendant argues, and plaintiff concedes, that $2,438.66 in costs are duplicative and may be discounted from the initial estimate for litigation costs and expenses.

In sum, the court finds that plaintiff is entitled to recover $3,112.79 in litigation expenses and costs.

IV. Conclusion

For the foregoing reasons, the court awards plaintiff's attorneys' fees and costs in the following amounts:

Lynn Hubbard:	145.10 hours @ $250/hr	= $36,275.00
Lynn Hubbard:	8 hours @ $175/hr [2]	= $ 1,400.00

FN2. This figure reflects the rate that counsel chose to bill for travel.

Steven Wedel:	4.50 hours @ $150/hr	= $ 675.00
Scottlynn Hubbard:	48.30 hours @ $150/hr	= $ 7,245.00
Mark Emmett:	21.75 hours @ $150/hr	= $ 3,262.50
Paralegals:	51.30 hours @ $75/hr	= $ 3,847.50
Subtotal attorneys' fees:		= $52,705.00
Court reduction		= $44,799.25
Litigation expenses and costs:		= $ 3,112.79
Total attorneys' fees and costs:		= $47,912.04

*6 It is therefore ORDERED that plaintiff's motion for attorneys' fees and costs is GRANTED in the total sum of $47,912.04.

IT IS SO ORDERED.

E.D.Cal.,2007.
Chapman v. Pier 1 Imports, Inc.
Slip Copy, 2007 WL 2462084 (E.D.Cal.)

END OF DOCUMENT

EXHIBIT B

Service: Get by LEXSEE®
Citation: 2004 U.S. Dist. Lexis 29174

*2004 U.S. Dist. LEXIS 29174, **

MARSHALL LOSKOT, Plaintiff, v. USA GAS CORPORATION, et al., Defendants.

NO. CIV. S-01-2125 WBS KJM

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2004 U.S. Dist. LEXIS 29174

April 23, 2004, Decided
April 26, 2004, Filed

SUBSEQUENT HISTORY: Reconsideration granted by, Costs and fees proceeding at Loskot v. USA Gasoline Corp., 2004 U.S. Dist. LEXIS 29176 (E.D. Cal., July 23, 2004)

CORE TERMS: deposition, paralegal, travel time, hourly rate, secretary, prevailing party, barrier, travel, unsuccessful, settlement, billed, associate-level, restroom, settlement agreement, legal relationship, service station, fee award, reasonableness, expended, partial, hourly, prevailing, declares, spent, material alteration, associate attorney, injunctive relief, lodestar figure, work performed, reimbursement

COUNSEL: **[*1]** For Marshall Loskot, Plaintiff: Adam Sorrells, Law Offices of Lynn Hubbard III, Chico, CA.

For USA Gasoline Corporation, Doing business as USA Mini Mart, Palisades Gas and Wash, Inc, Defendants: Amy Wintersheimer Findley, Gray Cary Ware and Freidenrich, San Diego, CA.

JUDGES: WILLIAM B. SHUBB, UNITED STATES DISTRICT JUDGE.

OPINIONBY: WILLIAM B. SHUBB

OPINION: MEMORANDUM AND ORDER RE: ATTORNEY'S FEES

It is undisputed that plaintiff is a person with disabilities who uses a wheelchair for mobility. In his complaint, plaintiff alleged that he encountered a number of architectural barriers when he visited the service station that is the subject of this case. The complaint sought injunctive relief under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq., and compensatory damages under state statutes including the Unruh Civil Rights Act, California Civil Code section 51, et seq., and the California Disabled Persons Act, California Civil Code section 54, et seq.

This case was tried by the court, sitting without a jury, on July 9 and 10, 2003. Evidence was presented relating to several alleged architectural barriers **[*2]** to accessability of the premises which were the subject of this action. At the conclusion of the evidence, counsel for the respective parties agreed upon a resolution as to each of the alleged barriers except one -- the alleged barrier created by the restroom facilities at defendants' service station. The court directed counsel to submit a written stipulation setting forth that agreement. The parties lodged the stipulation on December 5, 2003, which the court approved in its order of February 17, 2004. As to the alleged barrier created by the restroom facilities, the court decided against plaintiff, finding "that removal of the barriers to use of the restroom facilities in this case is not readily achievable." (Dec. 2, 2003, Order, at 6).

Plaintiff moves for attorney's fees pursuant to 42 U.S.C. § 12205 and California law. Specifically, plaintiff requests fees for attorneys, paralegals, and secretaries totaling $ 41,457.25.

14

I. Prevailing Party

A court may award reasonable attorney's fees to a plaintiff who is a "prevailing party" in an action brought under the ADA. 42 U.S.C. § 12205. A "prevailing party" is one who succeeds **[*3]** on any significant issue in the litigation, achieving some of the benefit sought in bringing the suit, and resulting in a "material alteration of the legal relationship of the parties." Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792-93, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989). A material alteration of the parties' legal relationship occurs when the plaintiff obtains an enforceable judgment against the defendant or "comparable relief through a consent decree or settlement." Farrar v. Hobby, 506 U.S. 103, 111, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992).

In Fischer v. SJB-P.D., Inc., 214 F.3d 1115, 1118 (9th Cir. 2000), the Ninth Circuit held that a plaintiff who entered an enforceable agreement settling his ADA claim for injunctive relief was a prevailing party. There, the settlement agreement included a provision that required the defendant to print a nondiscrimination policy, insert it into the company manual, and post it conspicuously on its premises. Id. at 1119. The court reasoned that the plaintiff prevailed because he obtained "an enforceable settlement that requires [the defendant] to do something it otherwise would not be required to do," thus constituting **[*4]** a material alteration in the legal relationship of the parties. Id. at 1118.

Subsequent to the Fischer opinion, the Supreme Court decided Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't. of Health & Human Res., 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001). In Buckhannon, the Supreme Court suggested that a plaintiff does not achieve prevailing party status where the only relief obtained is through a private settlement. Id. at 604 n.7. The Supreme Court noted that unlike consent decrees, which may serve as the basis for an attorney's fees award, "[p]rivate settlements do not entail the judicial approval and oversight" that would signify a court-ordered change in the legal relationship of the parties. Id. The Court also observed that "federal jurisdiction to enforce a private settlement will often be lacking unless the terms of the agreement are incorporated into the order." Id.

The Ninth Circuit, however, declined to adopt Buckhannon's reasoning in Barrios v. Cal. Interscholastic Fed'n, 277 F.3d 1128, 1134 n.5 (9th Cir. 2002). The Barrios panel stated that it would not be bound by the Supreme Court's dictum **[*5]** in Buckhannon, "when it runs contrary to this court's holding in Fischer, by which we are bound." Id. Instead, the Barrios panel reaffirmed the Ninth Circuit's holding in Fischer. Id. at 1134.

Here, the parties entered into a legally enforceable settlement agreement to resolve plaintiff's claims for injunctive relief. Pursuant to the settlement, defendants agreed to: (1) relocate the service station's public telephone such that there is accessible clear space; (2) install a buzzer and intercom system near the accessible gasoline pump so that disabled customers can contact the service station employees for gasoline service during specified hours; (3) add an accessible curb ramp adjacent to the disabled parking stall; and (4) maintain clear space in front of the counter located within the mini-mart. (Feb. 17, 2004, Order). Having entered into a legally enforceable settlement agreement, it is clear that plaintiff is a prevailing party. n1 Barrios, 277 F.3d at 1134; Fischer, 214 F.3d at 1118.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Because the court determines that plaintiff is a prevailing party under Ninth Circuit authority, the court does not address the issue of whether he is also entitled to fees under state law.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*6]

II. Lodestar Method

15

Because plaintiff is entitled to a reasonable fee award as a result of his prevailing party status, the court must determine the amount of the fee award according to the "lodestar" method for calculating attorney's fees. See Widrig v. Apfel, 140 F.3d 1207, 1209 (9th Cir. 1998) (citing Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)). To determine the appropriate fee amount, the court multiplies a reasonable hourly rate by the number of hours reasonably expended in the litigation. Id. There is a strong presumption that the lodestar amount is reasonable. Harris v. Marhoefer, 24 F.3d 16, 18 (9th Cir. 1994). However, the court may adjust the lodestar figure if various factors overcome the presumption of reasonableness. n2 Hensley, 461 U.S. at 433-34; Morales v. City of San Rafael, 96 F.3d 359, 363-64 (9th Cir. 1996).

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 The court may adjust the lodestar figure on the basis of the Kerr factors:

> (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Morales, 96 F.3d at 363 n.8. (citing Kerr v. Screen Guild Extras, Inc., 526 F.2d 67, 70 (9th Cir. 1975)). Many of the Kerr factors have been subsumed in the lodestar approach. Id. (citing Cunningham v. County of Los Angeles, 879 F.2d 481, 487 (9th Cir. 1988)). Moreover, the court should consider the factors established by Kerr, but need not discuss each factor. Sapper v. Lenco Blade, Inc., 704 F.2d 1069, 1073 (9th Cir. 1983).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*7]**

The parties agree that plaintiff did not obtain all the relief he sought in his complaint, but dispute plaintiff's success in the litigation as a whole. Where "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." Hensley, 461 U.S. at 438. A critical factor in the court's determination of an appropriate fee award is the extent of a plaintiff's success, measured by the "results obtained" in litigation. Id. at 434. The Supreme Court has considered this factor "particularly crucial" where a plaintiff is deemed "prevailing" even though he did not succeed on all his claims for relief. Id.

The Ninth Circuit has instructed district courts to follow a two-part analysis in cases in which a plaintiff's success is limited. Thorne v. City of El Segundo, 802 F.2d 1131, 1141 (9th Cir. 1986). "First, the court asks whether the claims upon which the plaintiff failed to prevail were related to plaintiff's unsuccessful claims. If unrelated, the final fee award may not include time expended on the unsuccessful claims. **[*8]** " Id. (citing Hensley, 461 U.S. at 434-35). Where the claims are related, the court evaluates the "significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." Id.

"[C]laims are unrelated if they are distinctly different claims for relief that are based on different facts and legal theories'; claims are related if they involve a common core of facts or [are] based on related legal theories.'" Schwarz v. Sec'y of Health & Human Servs., 73 F.3d 895, 902 (9th Cir. 1995) (quoting Hensley, 461 U.S. at 434-35). Courts are reluctant to reduce a fee award based on partial success where a plaintiff's successful and unsuccessful claims are "inextricably intertwined" and the plaintiff achieves a "substantial portion of the benefit sought from the suit." Passantino v. Johnson & Johnson Consumer Prods., 212 F.3d 493, 518 (9th Cir. 2000).

16

Plaintiff dropped some of his claims before trial. However, the work on those claims was intertwined with the work on the claims that were brought to trial. The claims that remained at trial were resolved by the **[*9]** settlement agreement, except for the claims regarding the service station's restroom facilities. Up through and including the time of trial, the claims were so intertwined that no reduction for partial or limited success would be reasonable. Cf. Hensley, 461 U.S. at 435 ("Much of counsel's time [was] devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis."). Therefore, the court will not reduce attorney's fees based on any partial or limited success for work performed up through and including trial.

However, separate from the work that led to the settlement agreement was the post-trial work on the one remaining set of claims -- the claims regarding the service station's restroom facilities. Those claims were wholly unsuccessful and the post-trial work on those claims was not intertwined with the work on the successful claims. Accordingly, the court will not award attorney's fees for the time between July 21 and December 2, 2003, inclusive, and on December 5, 2003, spent working on briefs and reviewing the court's order of December 2, 2003, regarding the restroom facilities. That time is comprised **[*10]** of 3.1 hours by Lynn Hubbard, 6.6 hours by Scott Hubbard, 1.2 hours by Bonnie Vonderhaar, and .6 hours by Alisha Petras.

A. Reasonable Hourly Rate

In order to determine the reasonableness of hourly rates claimed, the court looks to the "prevailing market rates in the relevant community," Blum v. Stenson, 465 U.S. 886, 895, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984), for "similar work performed by attorneys of comparable skill, experience, and reputation." Chalmers v. City of Los Angeles, 796 F.2d 1205, 1210 (9th Cir. 1986); see also Blum, 465 U.S. at 895-96 n.11 ("[T] he burden is on the fee applicant to produce satisfactory evidence . . . that the requested rates are in line with those prevailing in the community."). The relevant community is generally the forum in which the district court sits. Barjon v. Dalton, 132 F.3d 496, 500 (9th Cir. 1997).

1. Attorney and Paralegal Time

Plaintiff's lead counsel, Lynn Hubbard, requests reimbursement at an hourly rate of $ 300 for most of his hours, despite the fact that he has never been awarded such a high hourly rate in any fee motion in this district, and he is not aware of any other disability **[*11]** attorney who has been awarded a rate higher than $ 250 in this district. n3 In their motion, plaintiff's attorneys also request hourly rates of $ 175 for associate attorney Scott Hubbard and $ 65 for paralegals. Judges in this district have repeatedly found that reasonable rates in this district are $ 250 per hour for an experienced attorney, $ 150 for associates, and $ 75 for paralegals. See, e.g., Pickern v. Marino's Pizza & Italian Rest., 2003 U.S. Dist. LEXIS 26950, CIV. S-01-1096 WBS GGH (E.D. Cal. April 9, 2003); Loskot v. Pine St. Sch., 2002 U.S. Dist. LEXIS 27956, CIV. S-00-2405 DFL JFM (E.D. Cal. Nov. 7, 2002); Loskot v. Feedbag Rest., 2002 U.S. Dist. 27955, CIV. S-00-1495 WBS GGH (E.D. Cal. May 22, 2002); Connally v. Brooks, 2000 U.S. Dist. 22755, CIV. S-99-0220 DFL PAN (E.D. Cal. Dec. 4, 2000). After considering attorney Lynn Hubbard's legal experience, his submitted declarations, and compensation in other cases brought in this district, the court determines that the prevailing hourly rate in the Sacramento area for similar work performed by attorneys of comparable skill, experience, and reputation is $ 250. The court will award hourly rates of $ 150 and $ 65 for time billed by associate attorney Scott Hubbard and paralegals Bonnie Vnderhaar and Alisha **[*12]** Petras, respectively. n4 The court calculates the lodestar figure based on these hourly rates.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 For some of his hours, including associate-level tasks and travel time, Lynn Hubbard requests reimbursement at the rate of $ 175 per hour. The court will calculate the fee for associate-level tasks at the associate rate, discussed in text at Section II (B) (6), infra. Fees for travel time are discussed in text at Section II (B) (5), infra.

n4 In Lynn Hubbard's declaration filed with the motion, he describes Bonnie Vonderhaar and Alisha Petras as paralegals; he does not name any other paralegals. (Lynn Hubbard Decl. filed March 16, 2004, P 21). 17

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

2. Secretary Time

In their moving papers, plaintiff's attorneys request reimbursement of $ 65 per hour for 37.10 hours of secretary time, but do not name the secretaries; 37.10 hours is the exact amount of time billed for personnel other than attorney Lynn Hubbard, attorney Scott Hubbard, paralegal Bonnie Vonderhaar, and paralegal Alisha Petras. Those other **[*13]** personnel are named in the billing statement as "Shana," "Cathy," "Jamie," "Cindy," "Melinda," and "Crista." In reply, Lynn Hubbard declares that Shana Bates and Cathy Stewart were paralegals. (Lynn Hubbard Decl. filed April 12, 2004, PP 2, 6). The court questions whether the work they performed is properly characterized as the work of paralegals. If Shana Bates and Cathy Stewart were actually doing the work of paralegals, plaintiff's counsel should have described them as such in their moving papers. Instead, Lynn Hubbard described only Bonnie Vonderhaar and Alisha Petras as paralegals. (Lynn Hubbard Decl. filed March 16, 2004, P 21). Therefore, it appears that Shana Bates and Cathy Stewart, along with "Jamie," "Cindy," "Melinda," and "Crista" should be considered secretaries, rather than paralegals.

Federal courts in this circuit have held that secretarial salaries and benefits are "a part of the usual and ordinary expenses of an attorney in his practice [and] are not separately reimbursable, for these constitute his overhead or cost of doing business and are taken into account in determining his hourly rate or the fixed fee for performing a specific legal service." In re Pac. Exp., Inc., 56 B.R. 859, 865 (Bkrtcy. E.D. Cal. 1985); **[*14]** see In re Wepsic, 238 B.R. 845, 851 (Bkrtcy. S.D. Cal. 1999) (even though attorney billed for preparation of the service of the complaint at half her hourly rate, the court disallowed the cost finding that it was secretarial in nature and therefore part of the general overhead); see also Connally v. Denny's, Inc., CV-F 96-5521 SMS, at 8 (E.D. Cal. Aug. 10, 1999) (holding that administrative work was not recoverable). The court is aware of only one decision by a judge in this district awarding fees for clerical staff, Pine St. Sch.,2002 U.S. Dist. LEXIS 27956, CIV. S-00-2405 DFL JFM, at 10 (E.D. Cal. Nov. 7, 2002). In that decision, without any discussion in the order, the court awarded $ 125 for clerical staff.

Here, the court concludes that secretary time for tasks including creating files, sending faxes, making copies, and calendaring dates, is an overhead expense that goes into an attorney's hourly rate and should not be billed to a client separately. Accordingly, the court will allow no fees for secretary time.

B. Reasonable Time and Rates for Certain Tasks

1. Conflict Check

As the Supreme Court held in Hensley, 461 U.S. at 434, counsel for a prevailing **[*15]** party should not request fees on an attorney's fee motion that he would not otherwise bill his client. Here, Lynn Hubbard seeks to recover for .7 hours he spent conducting a conflict check. He declares that he is the only person at his firm who can perform a conflict check to ensure that he does not sue a prior client or a defendant who has already agreed to make specific changes at a particular location. (Lynn Hubbard Decl. filed April 12, 2004, P 16). However, defendants' counsel declares that her firm does not typically charge for conflict checks (Winterscheimer Findley Decl. P 3), and the court is not persuaded that Lynn Hubbard routinely bills paying clients and collects from them for time spent on conflict checks. Accordingly, the court will not allow this fee.

2. Summary Adjudication Motion

Plaintiffs are not entitled to recover fees for unsuccessful stages of litigation, unless the unsuccessful stage was a necessary step to an ultimate victory. Cabrales v. County of Los Angeles, 935 F.2d 1050, 1053 (9th Cir. 1991). Plaintiff's counsel brought an unsuccessful motion for summary adjudication. The court denied the motion without the need for oral argument. **[*16]** Plaintiff's counsel claims that without bringing this motion, he would have had no way of anticipating that the court would adopt the ruling of Colorado Cross Disability Coalition v. Hermanson Family Ltd. P'ship, 264 F.3d 999 (10th Cir. 2001), regarding factors to consider in determining whether removal of a barrier to access is readily achievable. However, the court 18 does not view the motion as a necessary step toward an ultimate victory just because the court's ruling helped tutor plaintiff's counsel on the applicable law. Accordingly, the court disallows fees for time related to this motion as follows: 5.4 hours for Lynn Hubbard, 3.3 hours for Scott Hubbard, 1.8 hours for Bonnie Vonderhaar, and .3 hours for Alisha Petras.

3. Depositions of Mark Conant and Kriston Qualls

Defendants argue that plaintiff's counsel should receive none of the $ 2,799 in requested fees relating to the depositions of Mark Conant and Kriston Qualls, including $ 875 for travel time to and from the Los Angeles area and $ 845 for fees for work regarding the motion for sanctions. On December 12, 2003, plaintiff served deposition notices for Conant and Qualls, noticing the depositions for **[*17]** December 30, 2003. On December 20, 2003, defendants' counsel, Amy Winterscheimer Findley, wrote to plaintiff's counsel, Lynn Hubbard, informing him that Qualls and Conant were unavailable on December 30, 2003. On January 2, 2004, plaintiff filed a motion for sanctions related to Qualls' and Conant's depositions. On January 7, 2004, plaintiff withdrew the motion for sanctions. On January 8, 2004, the depositions were taken. Conant's deposition took fifteen minutes and Quall's took only six minutes.

Defendants argue that the very short time of the actual depositions shows that plaintiff could have obtained this information through a much less expensive discovery tool, such as requests for admissions or special interrogatories. The information obtained at the depositions was relevant to whether removal of the alleged barriers was readily achievable, dealing with factors such as the size and financial resources of defendants' business. However, the court agrees with defendants that this limited information could have been obtained in a less expensive manner not requiring travel and that the motion for sanctions was unnecessary. Therefore, the court will subtract the fees for travel related **[*18]** to these depositions and the fees for the motion for sanctions.

4. Continued Deposition of Plaintiff

Defendants argue that plaintiff's counsel seeks to recover unreasonable fees related to the completion of plaintiff's deposition. Plaintiff's attorney Scott Hubbard became ill at plaintiff's deposition and was unable to finish. According to defendants' counsel, Scott Hubbard would not stipulate to a continuation date. (Wintersheimer Findley Decl. P 7). Thereafter, defendants' counsel sent seven separate letters, to plaintiff's counsel, Lynn Hubbard, attempting to schedule the completion of plaintiff's deposition. (See id. Ex. 7). Defendants' counsel raised the issue with the court at the final pre-trial conference. Ultimately, the deposition was completed the day before trial began, with Lynn Hubbard representing plaintiff at the continued deposition.

Although it is certainly understandable that attorney Scott Hubbard stopped the deposition when he became ill, it should not have required so much back-and-forth between counsel and the ultimate intervention of the court in order for the deposition to have been completed. Moreover, defendants should not be required to pay **[*19]** for Lynn Hubbard's time traveling to and from the continued deposition, because it was continued through no fault of defendants. Accordingly, the court will disallow fees for Lynn Hubbard's 4 hours of travel time.

5. Travel Time

Plaintiff seeks 19.5 hours of travel fees for Lynn Hubbard and 4 hours of travel fees for Scott Hubbard, all at $ 175 per hour. The court has already determined that defendants will not be required to pay for any of Lynn Hubbard's 4 hours of travel time to and from the continuation of plaintiff's deposition, nor are defendants required to pay for any of Lynn Hubbard's 5 hours of travel time for the depositions of Mark Conant and Kriston Qualls. As to the remaining travel time, 2.5 hours were for Lynn Hubbard's travel between his office in Chico and the service station in Redding for a site inspection, 8 hours were for Lynn Hubbard's travel between Chico and Sacramento for trial, and 4 hours were for Scott Hubbard's travel between Chico and Sacramento for the first part of plaintiff's deposition.

19

Plaintiff's counsel argues that travel time may be billed on the ground that it is customary for attorneys in the private bar to bill their clients for this **[*20]** time, citing Davis v. City and County of San Francisco, 976 F.2d 1536, 1543 (9th Cir. 1992), vacated in part as moot, 984 F.2d 345 (9th Cir. 1993), and Allen v. City of

Los Angeles, 1995 U.S. Dist. LEXIS 13929, No. CV 91-2497 JGD, 1995 WL 433720, at *10 (C.D. Cal. Jan. 13, 1995). However, the Davis and Allen courts actually held that "[t]he touchstone in determining whether hours have been properly claimed is reasonableness. The assessment of reasonableness is made by reference to standards established in dealings between paying clients and the private bar." Allen, 1995 U.S. Dist. LEXIS 13929 at *27, 1995 WL 433720, *10 (quoting Davis, 976 F.2d at 1543). In Davis, the plaintiff's counsel had submitted evidence establishing that local attorneys customarily billed their clients for travel time, and the defendant had not introduced any evidence to the contrary. 976 F.2d at 1543.

Here, Lynn Hubbard has made no showing that he routinely bills, and recovers from, his paying clients for travel time between Chico and Sacramento on a regular basis. On the other hand, defendants' counsel have presented evidence that they did not charge defendants for any travel **[*21]** time to and from court or to and from depositions. (Winterscheimer Findley Decl. P 4). Lynn Hubbard has represented plaintiffs in more than 400 cases in this court over the last four years. There is no suggestion that he tries more cases in Chico than in Sacramento. Thus, it appears that it is for his convenience that he maintains his offices outside of the Sacramento area, and defendants should not be required to bear that expense, even as losing parties.

Accordingly, the court will not allow recovery for travel time between Sacramento and counsel's office, a full two hours away, in Chico. However, the court will allow plaintiff's counsel to recover for travel to Redding for the site inspection.

6. Associate-Level Tasks

In MacDougal v. Catalyst Nightclub, 58 F. Supp. 2d 1101, 1105-06 (N.D. Cal. 1999), the court held that an experienced attorney should not have claimed his full hourly rate for tasks that could have been performed by junior associates, paralegals, or secretaries. The MacDougal court recognized that although the senior attorney "did not have the resources or staff of a large law firm to support him during [the] litigation," he could have **[*22]** utilized his associate to perform tasks usually performed by less experienced associates. Id. at 1106.

Defendants argue that Lynn Hubbard should not be compensated at his full hourly rate time spent: (1) preparing plaintiff's responses to defendants' first request for production of documents and first set of interrogatories; (2) reviewing and finalizing plaintiff's bill of costs; and (3) preparing the instant motion for attorney's fees. In reply, Lynn Hubbard declares that there is no evidence that an associate attorney or paralegal could have answered the interrogatory questions with sufficient clarity to avoid a land mine at trial, and that he can always speak to the value of an associate attorney's work, but an associate attorney cannot address the value of his work. (Lynn Hubbard Decl. filed April 12, 2004, PP 30, 31, 41). The court is not persuaded by these explanations for what appear to be associate-level tasks.

Here, it is clear that Lynn Hubbard had the assistance of associate attorney Scott Hubbard, paralegals, and secretaries throughout the litigation. Lynn Hubbard has exercised some billing judgment by reducing the rate to $ 175 per hour for 5.1 hours **[*23]** spent preparing interrogatories, requests for production, notices of depositions, and subpoenas. However, because the court has determined that the associate rate is $ 150 per hour, the court will apply that lower rate. The court will also apply that lower rate of $ 150 per hour to the 10 hours of work by Lynn Hubbard related to the associate-level tasks enumerated (1)-(3) above. Accordingly, a total of 15.1 hours spent by Lynn Hubbard on associate-level tasks will be reduced to $ 150 per hour.

III. Conclusion

Based on the foregoing discussion, plaintiff will be awarded the following amounts:

Lynn Hubbard: 79.95 hours @ $ 250/hr = $ 18,987.50

Lynn Hubbard: 15.1 hours @ $ 150/hr = $ 2,265.00

Lynn Hubbard: 2.5 hours @ $ 175/hr = $ 437.50

20

Scott Hubbard: 7.85 hours @ $ 150/hr = $ 1,177.50

Bonnie Vonderhaar: 12.3 hours @ $ 65/hr = $ 799.50

Alisha Petras: 7.1 hours @ $ 65/hr = $ 461.50

Secretaries: -0-

TOTAL = $ 24,128.50

IT IS THEREFORE ORDERED that plaintiff's motion for attorney's fees be, and the same hereby is, GRANTED in the amount of $ 24,128.50.

DATED: April 23, 2004

WILLIAM B. SHUBB

UNITED STATES DISTRICT JUDGE

Service: **Get by LEXSEE®**
Citation: **2004 U.S. Dist. Lexis 29174**
View: Full
Date/Time: Monday, August 14, 2006 - 1:39 PM EDT

* Signal Legend:
- Warning: Negative treatment is indicated
- Questioned: Validity questioned by citing refs
- Caution: Possible negative treatment
- Positive treatment is indicated
- Citing Refs. With Analysis Available
- Citation information available

* Click on any *Shepard's* signal to *Shepardize®* that case.

LexisNexis® About LexisNexis | Terms & Conditions
Copyright © 2006 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

21

EXHIBIT C

Martinez v. G. Maroni Co.
E.D.Cal.,2007.
Only the Westlaw citation is currently available.
United States District Court,E.D. California.
Tony MARTINEZ, Plaintiff,
v.
G. MARONI CO., dba Church's Chicken # 948, and Maroni-Lutfi Property Management, LP, Defendants.
No. Civ. S-06-1399 DFL GGH.

May 2, 2007.

Mark W. Emmett, Disabled Advocacy Group, APLC, Chico, CA, for Plaintiff.
Shalend Shane Singh, Kring & Chung, Sacramento, CA, for Defendants.

Memorandum of Opinion and Order
DAVID F. LEVI, United States District Judge.
*1 Plaintiff Tony Martinez moves for attorneys' fees in the amount of $6,958.25 following his pre-trial settlement with defendants G. Maroni Co., doing business as Church's Chicken, and Maroni-Lutfi Property Management. Defendants challenge the requested fee award. For the following reasons, the court awards $1804.08 in attorneys' fees and costs.

I.

On June 22, 2006, Martinez filed this action against defendants, alleging forty-one violations of the Americans with Disabilities Act (ADA) and related state statutes. Defendants made a Federal Rule of Civil Procedure 68 offer of judgment to plaintiff on August 16 and filed a motion to dismiss on August 17. On August 23, plaintiff accepted defendants' Rule 68 offer. On September 6, judgment entered based upon the agreement. The parties left the issue of attorneys' fees for this motion.

The forty-one barriers alleged by plaintiff do not directly correspond to the modifications specified in the settlement agreement. Under the settlement agreement, defendants paid plaintiff $4,001 and agreed to: (1) add tow away parking signs; (2) add a van-accessible parking place with signage; (3) remove outdoor seating; (4) add the proper ISA sticker at the entrance closest to the van-accessible parking; (5) remove a partition in the women's restroom; (6) lower the toilet paper dispensers in both the men's and women's restrooms; and (7) check and maintain the sinks in the men's and women's restrooms for proper knee clearance and insulation.

Under a prior settlement agreement with a different plaintiff in a separate ADA action, defendants agreed to remedy "the lack of a van-accessible parking space" at the restaurant. When plaintiff filed this action, the specified time in which to remedy barriers under the prior agreement had not expired.

II.

The ADA and Unruh Civil Rights Act provide that a prevailing party should recover reasonable attorney's fees. *See* *Martinez v. Longs Drug Stores*, Inc., No. Civ-S-03-1843, 2005 WL 3287233, at *1 (E.D.Cal. Nov.28, 2005). Calculating an appropriate fee award involves a two-step process. *Fisher v. SJB-P.D. Inc.*, 214 F.3d 1115, 1119 (9th Cir.2000)."First, the court must calculate the 'lodestar figure' by taking the number of hours reasonably expended on the litigation and multiplying it by a reasonable hourly rate."*Id.*"Second, a court may adjust the lodestar upward or downward using a 'multiplier' based on factors not subsumed in the initial calculation."*Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1045 (9th Cir.2000).

Plaintiff seeks $5,950 for 30.9 attorney hours, $491.25 for 6.55 paralegal hours, and $517 for costs and expenses, for a total requested award of $6,958.25. Defendants argue that plaintiff's fee should be reduced in the following manner: (1) the attorneys' hourly rates should be lowered; (2) all paralegal time should be disallowed; (3) all billings after the August 16, 2006 Rule 68 offer should be disallowed; (4) all attorney travel time should be disallowed; (5) an appropriate reduction should be made for alleged barriers that defendants had previously agreed to remove; (6) an appropriate reduction should be made for plaintiff's rate of success; and (7) all alleged costs and expenses should be disallowed .[FN1]Defendants' suggested reductions are discussed individually below.

FN1. Defendants also argue that the court has discretion to deny all fees because plaintiff sued without providing pre-filing notice to defendants. The court, however, has previously held that "the ADA does not require plaintiffs to engage in such pre-litigation efforts ."*Martinez*, 2005 WL 3287233, at *2.

A. Attorney Rates

*2 Plaintiff seeks compensation for Lynn Hubbard at $300 per hour and Mark Emmett, Hubbard's associate, at $200 per hour. Defendants challenge these rates, arguing that $250 per hour for Hubbard and $150 per hour for Emmett are more appropriate rates. The court finds defendants' suggested rates to be consistent with prior fee awards in the district for litigation of this subject matter and complexity. *See* Martinez, 2005 WL 3287233, at *4. Here, as in *Martinez,* plaintiff provides "no other evidence other than [the attorney's] declaration to justify a rate."*Id.* at 4. Because plaintiff has failed to demonstrate why Hubbard and Emmett should be compensated at above-market rates, the court will calculate their hourly fees using the $250 and $150 per hour rates, respectively.

B. Paralegal Fees

Plaintiff seeks compensation for paralegal work at $75 per hour. Defendants argue that paralegal fees should not be reimbursed because plaintiff's paralegal declarations do not state the required qualifications under Cal. Bus. & Prof.Code § 6450 and the requested fees relate to mostly secretarial or administrative tasks. The court grants paralegal fees but reduces them based upon the substance of work performed. The court previously found paralegal Bonnie Vonderhaar qualified under § 6450. *Sanford,* 2005 WL 4782697, at *4. Although it previously found Crista Duncan unqualified, *id.,* she since has satisfied § 6450 through completion of the U.C. Davis paralegal program. As for the substance of the work billed, plaintiff seeks fees at the paralegal rate for copying, faxing, and mailing documents. "[F]iling and serving documents are secretarial tasks that cannot be billed at a paralegal rate, regardless of who performs them."*Martinez,* 2005 WL 3287233, at *7. The court reduces plaintiff's paralegal fees by 2.2 hours for tasks more appropriately handled by a secretary than a paralegal.[FN2]

FN2. The court denies paralegal fees for the following work: Crista Duncan, 7/03/06 (both entries); Crista Duncan, 7/14/06; Bonnie Vonderhaar, 7/27/06 (both entries, with the exception of 0.2 hours allowed for meeting with calendar clerk); Crista Duncan, 8/03/06.

C. Rule 68 Reduction

Defendants argue that plaintiff should not recover fees for activity following defendant's Rule 68 offer on August 16, 2006. The argument lacks merit. Defendants' Rule 68 offer of judgment stated that it "exclud[ed] costs and attorney fees now accrued."It was silent as to whether its award of $4,001 included any costs or fees accrued after the offer's acceptance. Such ambiguity is construed against the offeror. *See* *Nusom v. Comh Woodburn, Inc.,* 122 F.3d 830, 833-34 (9th Cir.1997). The court, however, need not interpret the offer's silence. "[A] Rule 68 offer for judgment in a specific sum together with costs, which is silent as to attorney fees, does not preclude the plaintiff from seeking fees when the underlying statute does not make attorney fees a part of costs."*Id.* at 835. Since neither the ADA nor applicable California law defines costs to include attorney's fees, *Martinez,* 2005 WL 3287233, at *4, the accepted Rule 68 offer does not bar plaintiff from seeking post-acceptance fees.

D. Travel Time

*3 Plaintiff seeks compensation at a reduced rate for attorney time spent traveling to and from the barrier site. Defendants argue that plaintiff's claim for attorney travel time should be disallowed as unreasonable. The court previously has rejected compensation for Hubbard's travel time from his office in Chico to Sacramento barrier sites. Although such time normally might be billed to a paying client, such a client would have had the opportunity to choose whether to accept such charges or find an attorney closer to the property at issue. *See* *Martinez,* 2005 WL 3287233, at *5. Defendants, however, do not have the benefit of such a choice. Moreover, the court finds that it would be unreasonable to compensate Hubbard and his associate for travel time from Chico to Sacramento when the attorneys generate a large volume of work in Sacramento and request compensation at Sacramento rates. *Id.* By continuing to base their offices in Chico, while focusing much of their practice on Sacramento, the attorneys accept the predictable time and expense involved with litigating in a community other than their own. The court reduces each attorney's fees by 4 hours for travel time.

E. Barriers Addressed in Prior Settlement

Plaintiff claims that he prevailed on his claim regarding barriers in the site's parking lot. Defendants argue that plaintiff should not receive fees for the van-accessible parking claim due to a prior settlement agreement requiring the addition of such a parking space. A plaintiff prevails on a claim when the claim materially alters a legal relationship to the plaintiff's advantage. *See* *Barrios v. California Interscholastic Fed'n,* 277 F.3d 1128, 1134 (9th Cir.2002). A legal relationship is altered when "the plaintiff can force the defendant to do something he otherwise would not have to do."*Id.* Here, although defendants agreed to provide plaintiff with the requested parking relief, a prior binding settlement agreement already required them to remedy the alleged barrier. Plaintiff received notice of the prior settlement agreement before entering into his agreement with defendants. Inclusion of van-accessible parking in this settlement did not impose new obligations upon defendants. To award fees for such activity would encourage unproductive and wasteful litigation. The court finds that plaintiff did not prevail for fee purposes on claims related to van-accessible parking due to the existence of a prior settlement agreement requiring such barriers to be remedied.

F. Degree of Success

Plaintiff originally alleged forty-one violations of federal and state law. He argues that he succeeded in 100% of his claims because defendants have agreed to remedy ADA violations related to (1) tow away parking signs, (2) van-accessible parking, (3) outdoor seating, (4) ISA stickers at the restaurant entrance, (5) the women's restroom toilet partition, (6) the lowering of toilet paper dispensers, and (7) clearance and insulation under bathroom sinks. Defendants argue, based on the settlement agreement, that plaintiff succeeded on seven of forty-one claims and should have fees reduced accordingly.[FN3]

FN3. As discussed above, the court finds for fee purposes that plaintiff was not a prevailing party on the van-accessible parking claim.

*4 The parties' methods for evaluating plaintiff's degree of success are too simplistic. Neither party attempts to demonstrate specifically how the settlement terms correspond with the originally claimed barriers. The court, to the best of its ability given the limited development of the claims, finds that the settlement addressed eleven of the forty-one alleged violations noted in the Preliminary Site Accessibility Report, attached to the complaint.[FN4] The court declines, however, to engage in a direct proportional reduction of the fees by the eleven out of forty-one success rate. Such precision is artificial, given the limited fee documentation provided by plaintiff. Plaintiff's billing records are "not sufficiently detailed to enable the court to match each entry to the corresponding claims."Martinez, 2005 WL 3287233, at *4. Therefore, although guided by the proportional reduction analysis, the court reduces plaintiff's fees by two-thirds based upon a general assessment of his success as well as the court's estimate of the amount of time reasonably incurred to achieve that level of success.

FN4. The court finds that the settlement agreement did not address the following claims: Claims 2-11 (concerning parking lot features other than tow away parking signs); Claims 12-15 (concerning exterior route of travel issues); Claims 18-19 (concerning the counters in the restaurant); Claims 22-24 (concerning the dining room seating); Claim 25 (concerning directional signage to the restroom); Claim 27 (concerning interior doors); Claims 30-32 (concerning water closet features or obstructions); Claims 33-36 (concerning toilet paper dispenser features unrelated to height); Claim 37 (concerning placement of the lavatory); and Claim 40 (concerning placement of the soap dispenser). The court finds that Claims 1, 16-17, 20-21, 26, 28-29, 38-39, and 41 are addressed by the settlement agreement.

G. Costs and Expenses

Plaintiff seeks $517.00 in litigation costs for electronic research fees, a site report, postage, and telephone service. Defendants argue that plaintiff has already been compensated for these expenses in the bill of costs. Defendants also argue that the expenses are unsubstantiated. These arguments are unpersuasive. Plaintiff's bill of costs sought compensation only for the filing fee and service. Here, plaintiff seeks compensation for different expenses. Although plaintiff does not provide extensive documentation supporting the expenses, the attorneys' declarations provide sufficient support given the reasonableness of plaintiff's requested amount. The court awards plaintiff $517.00 in costs and expenses.

III.

For the above reasons, the court awards the plaintiff $1287.08 in attorneys' fees, calculated as follows:

	Hours	Rate	Total
Lynn Hubbard	1.00	$250	$250.00
Mark	21.90	$150	$3285.00

Emmett			
Paralegals	4.35	$75	$326.25
Sub-total:			$3861.25
Negative Multiplier (2/3):			$1287.08

Additionally, the court awards plaintiff $517.00 in costs and expenses. In total, the court awards plaintiff $1804.08.

IT IS SO ORDERED.

E.D.Cal.,2007.
Martinez v. G. Maroni Co.
Slip Copy, 2007 WL 1302739 (E.D.Cal.)

END OF DOCUMENT

EXHIBIT D

Martinez v. Thrifty Payless, Inc.
E.D.Cal.,2006.
Only the Westlaw citation is currently available.
United States District Court,E.D. California.
Tony MARTINEZ, Plaintiff,
v.
THRIFTY PAYLESS, INC., dba Rite Aid Corporation, et al. Defendants.
No. 2:02-CV-0745-MCE-JFM.

Feb. 6, 2006.

Lynn Hubbard, III, Law Offices of Lynn Hubbard III, Chico, CA, for Plaintiff.
Lisa Diane Herzog, Hart King and Coldren, Santa Ana, CA, for Defendants.

MEMORANDUM AND ORDER
ENGLAND, J.
*1 Through the present motion, Plaintiff Tony Martinez ("Plaintiff") seeks attorney's fees and litigation expenses, pursuant to both state law and 42 U.S.C. § 12205 of the Americans with Disabilities Act ("ADA"), as a result of his October 11, 2005, acceptance of an Offer of Judgment submitted by Defendant Thrifty Payless, Inc. dba Rite Aid ("Rite Aid") in accordance with Federal Rule of Civil Procedure 68.

Under the terms of that Offer of Judgment, Rite Aid agreed to pay $6,001.00 in damages to Plaintiff, and further agreed to remedy certain Title III ADA violations, as alleged by Plaintiff, pertaining to Rite Aid's facility located at 831 K Street in Sacramento. Plaintiff now requests $24,480.25 for fees incurred by various attorneys and paralegals and $9,914.82 for costs and litigation expenses, for a total of $34,395.07. Rite Aid opposes the motion, claiming that the fees and expenses sought are excessive and unreasonable.

BACKGROUND

This dispute arises from Plaintiff's claim that he encountered architectural barriers making it difficult or impossible for him to access various portions of Rite Aid's 831 K Street facility. Plaintiff is a quadriplegic who requires the use of a wheelchair for mobility.

Plaintiff filed this lawsuit against Rite Aid on April 10, 2002. He has filed 48 similar cases in the Eastern District of California and one in the Northern District of California.

On October 11, 2005, Plaintiff accepted Rite Aid's Offer of Judgment, which included provisions for both payment of damages in the amount of $6,001.00 as well as provisions for remediating Rite Aid's claimed ADA violations. Plaintiff filed the instant motion for fees and costs after judgment was entered against Rite Aid on or about October 20, 2005.

STANDARD

Plaintiff's Complaint alleged violations of federal and California law. Plaintiff's federal claim arose under the ADA, while his state law claims arose under California's Unruh Act, Cal. Civ.Code § 51, California Health & Safety Code § 19953, and the California Disabled Persons Act, Cal. Civ.Code § 54-55.

Section 12205 of the ADA authorizes a court, in its discretion, to "allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs...."42 U.S.C. § 12205. A prevailing plaintiff under a statute so worded "should recover an attorney's fee unless special circumstances would render such an award unjust."*Hensley v. Eckerhart*, 461 U.S. 424, 429, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1976). A plaintiff who enters a legally enforceable settlement agreement is considered a prevailing party. *Barrios v. Cal. Interscholastic Fed'n*, 277 F.3d 1128, 1134 (9th Cir.2002).

Section 55 of the California Disabled Persons Act provides that "the prevailing party in the action shall be entitled to recover reasonable attorney's fees."Cal. Civ.Code § 55. Also, under California Health & Safety Code § 19953, "[a]ny person who is aggrieved or potentially aggrieved by a violation of this part ... may bring an action to enjoin the violation. The prevailing party in the action shall be entitled to recover reasonable attorney's fees."

ANALYSIS

*2 Rite Aid does not dispute that Plaintiff, as the prevailing party in this litigation, may recover both attorney's fees, as well as litigation expenses and costs, in pursuing the instant case. Rite Aid nonetheless asserts that the Court should exercise its discretion in determining that, under the circumstances present, those fees and expenses should either be disallowed in their entirety or significantly reduced.

A. Attorney's Fees

Rite Aid first asks the Court to follow the Central District's recent decision in *Doran v. Del Taco, Inc.*, 373 F.Supp.2d 1028 (C.D.Cal.2005), which denied attorney's fees in an ADA case where the plaintiff, also represented by the Law Offices of Lynn Hubbard, had neither provided pre-litigation notice of his intent to sue nor afforded the defendant, prior to suit, a reasonable opportunity to cure any of the alleged violations. As even the *Doran* court recognized, however, there is no Ninth Circuit precedent requiring an ADA plaintiff to provide notice before filing suit. *Id.* at 1031.Indeed, in *Botosan v. Paul McNally Realty*, 216 F.3d 827, 832 (9th Cir.2000), the Ninth Circuit held squarely to the contrary. Moreover, as *Doran* further concedes, repeated efforts by Congress to amend the ADA to provide pre-suit notice have uniformly failed. *Id.*

Consequently, even assuming Plaintiff failed to provide Rite Aid with adequate notice of its ADA shortcomings before instituting this lawsuit, the Court declines to rely on the reasoning of *Doran* in altogether denying Plaintiff's instant request for fees/expenses.

Rite Aid additionally urges this court to deny attorney's fees based on the reasoning of *Peters v. Winco Foods, Inc.*, 320 F.Supp.2d 1035 (E.D.Cal.2004). In that case, the court ordered the plaintiff, again represented by the Law Offices of Lynn Hubbard, to pay defendant's attorney's fees after finding all but one of the plaintiff's claims frivolous. *Id.* at 1041.The court was additionally persuaded by the plaintiff's failure to specifically identify any of the barriers he allegedly encountered at the defendant's facility and the plaintiff's abandonment of nearly all of the allegations contained in the original complaint. *Id.* at 1037-1038.The court also noted that the plaintiff had filed thirty identical complaints in that court alone. *Id.* at 1037.

Here, the Law Offices of Lynn Hubbard also failed to identify in the instant complaint any of the barriers encountered by Plaintiff Tony Martinez. For this reason, Rite Aid asks the court to follow *Peters* and exercise its discretion in denying attorney's fees. *Peters*, however, is clearly distinguishable from the instant case. In *Peters*, four of the five claims ultimately asserted by Plaintiff were found frivolous and the defendant was granted summary judgment on the remaining non-frivolous claim. *Id.* at 1038.

On the other hand, Plaintiff entered into a legally enforceable settlement with Rite Aid and is thus considered a "prevailing party," *see* *Barrios*, 277 F.3d at 1134. presumably entitled to attorney's fees "unless special circumstances would render such an award unjust."*Hensley*, 461 U.S. at 433.

*3 Although the Court understands Rite Aid's arguments, the Court believes there are no special circumstances here that would render an award of attorney's fees unjust. This Court must therefore determine the extent to which attorney's fees and litigation expenses are recoverable. In making that assessment, the Court must first identify the applicable "lodestar" for calculating attorneys' fees.

Under the lodestar method, a court multiplies the number of hours the prevailing attorney reasonably expended on the litigation by a reasonable hourly rate. *See* *Hensley*, 461 U.S. at 433;*see also* *Ketchum v. Moses*, 24 Cal.4th 1122, 1132, 104 Cal.Rptr.2d 377, 17 P.3d 735 (2001) (expressly approving the use of prevailing hourly rates as a basis for the lodestar). Courts may then adjust the lodestar to reflect other aspects of the case. *See* *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir.1975); *see also* *Serrano v. Priest*, 20 Cal.3d 25, 141 Cal.Rptr. 315, 569 P.2d 1303 (1977).

With respect to determining the appropriate hourly rate, courts generally calculate a reasonable fee according to prevailing market rates in the relevant legal community. *Blum v. Stenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). The general rule is that courts use the rates of attorneys practicing in the forum district, in this case, the Eastern District of California, Sacramento.

Gates v. Deukmejian, 987 F.2d 1392, 1405 (1993); Davis v. Mason County, 927 F.2d 1473, 1488 (9th Cir.1991), *cert. denied*502 U.S. 899, 112 S.Ct. 275, 116 L.Ed.2d 227 (1991). The burden is on the fee applicant to produce satisfactory evidence that the requested rates are "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation."*Blum*, 465 U.S. at 895 n. 11. A court will normally deem a rate determined this way to be reasonable. *Id.*

In this case, Rite Aid does not dispute the $250.00 hourly rate sought on behalf of attorney Lynn Hubbard for Plaintiff as unreasonable. (Opp., 15:17-20.) Nor does Rite Aid question the $150.00 rate sought by associate attorneys Scott Hubbard and Adam Sorrels or the $75.00 hourly rate requested by Plaintiff for paralegal services. *Id.* The Court agrees and finds that the above-mentioned hourly rates constitute fair and reasonable compensation.

With respect to the number of hours reasonably billed, however, the Court finds that certain categories of claimed fees are unreasonable and will not be permitted.

1. Form Pleadings

In opposing the reasonableness of Plaintiff's claimed charges for preparing documents that are literally the same in this case as in dozens of other cases also filed by Plaintiff's counsel, Rite Aid amply demonstrates that the Complaint, discovery, deposition notices and subpoenas issued in this case are no different from those generated by the myriad of other cases litigated by Plaintiff's counsel.

Plaintiff's counsel responds that the time entries have already been reduced to reflect only the time necessary to regenerate said documents. However, after analyzing the billing entries submitted by Plaintiff's counsel and the evidence presented by Rite Aid, the Court agrees that the claimed charges are not reasonable. For example, Plaintiff's counsel claims 1 hour to regenerate a complaint identical to other complaints he has filed in a myriad of other cases. The time to regenerate form-style pleadings alone accounts for approximately 18.9 hours in claimed attorney's fees. A total of 11.3 hours will be deducted from this total, corresponding to a $2,508.60 deduction in attorney's fees.[FN1] The remaining 7.6 hours will be billed at the associate rate, necessitating a further deduction of $540.[FN2]

FN1. In reaching this figure, the Court notes that approximately 72 percent of the form-pleading hours claimed by Plaintiff were billed by lead attorney Lynn Hubbard at a $250 per hour rate. Therefore, the Court applies the $250 hourly rate to 72 percent of the hours deducted and the $150 hourly rate to the remainder.

FN2. In line with the percentages indicated above, approximately 5.4 hours are applied to lead attorney Lynn Hubbard while the remaining 2.2 hours are attributable to associate attorney Scott Hubbard. Thus, 5.4 hours of lead attorney Lynn Hubbard's time is billed at the $150 per hour associate rate.

2. Additional Alleged Overbilling

*4 In addition to the excessive time billed for the filing of form-style pleadings, Rite Aid alleges additional overbilling based on duplicated billing entries and excessive time claimed for tasks previously performed by Plaintiff's counsel in dozens of other cases. Again, after analyzing the billing entries submitted by Plaintiff's counsel and the evidence presented by Rite Aid, the Court agrees.

Consequently, a further deduction of $3,125 in attorney's fees is warranted.

3. Travel Time Between Chico and Sacramento

Although Plaintiff's counsel maintains offices in Chico, he seeks reimbursement for travel time to Sacramento. This is despite the fact, as Rite Aid points out, that Plaintiff's counsel has filed literally hundreds of cases in the Sacramento Division of the Eastern District within the last five years. No evidence has been presented suggesting that Plaintiff's counsel tries more cases in Chico than in Sacramento, or that Plaintiff's counsel maintains offices outside the Sacramento area for any reason other than his own convenience. Rite Aid should not be required to shoulder travel expenses to Sacramento, and $3,300.00 in claimed attorneys' fees for such travel will not be permitted.[FN3]

FN3. Lead Counsel Lynn Hubbard claims

12 hours of travel to and from Sacramento at a rate of $175 per hour. Associate Counsels Scott Hubbard and Adam Sorrells claim 8 hours of travel to and from Sacramento at a rate of $ 150 per hour.

4. Clerical Tasks

Plaintiff seeks a total of $2,501.25 for services performed by paralegals in this case. While the Court will permit recovery of time expended by paralegals (*seeShaffer v. Superior Court*, 33 Cal.App. 4th 993 (1995)), secretarial costs are deemed by courts within this circuit to constitute overhead, or the cost of doing business, and are thus not separately reimbursable.

See,e.g.,Loskot v. USA Gas Corporation, CIV. S-01-2125 WBS KJM (E.D. April 26, 2004), *citingIn re Pac. Exp. ., Inc.*, 56 B.R. 859, 865 (Bkrtcy.E.D.Cal.1985); *In re Wepsic*, 238 B.R. 845, 851 (Bkrtcy.S.D.Cal.1999) (even though the attorney billed for preparation of the service of the complaint at half her hourly rate, the court disallowed the cost, finding that it was secretarial in nature and therefor part of general overhead); *Connally v. Denny's Inc.*, CV-F 96-5521 SMS (E.D. Cal. Aug 10, 1999) (holding that administrative work was not recoverable). Thus, to the extent that Plaintiff seeks reimbursement for clerical expenses, the Court will disallow those costs.

Previously, in a similar ADA case involving Plaintiff's counsel, this Court declined to engage in exhaustive analysis of claimed paralegal expenses. In that case Plaintiff's counsel separated paralegal and clerical time, although defendants alleged that some of the claimed paralegal time was actually clerical in nature. This Court allowed all paralegal time, preferring not to parse out clerical or secretarial tasks. In this case, in which only paralegal time is claimed, it appears that Plaintiff's counsel has reclassified some clerical tasks as "paralegal" tasks in order to obtain reimbursement for non-reimbursable expenses. While the Court remains reluctant to engage in exhaustive review of claimed paralegal expenses, the Court nonetheless refuses to impose costs on Rite Aid for tasks that are clearly clerical in nature. For this reason, the Court orders a $517.50 deduction in claimed paralegal expenses.

B. Litigation Expenses and Costs

*5 Plaintiff may recover, as part of the award of attorneys' fees in this matter, litigation expenses pursuant to 42 U.S.C. § 2205. The term "litigation expenses" in section 12205 has been interpreted to include "the same out-of-pocket expenses that are recoverable under 42 U.S.C. § 1988."*Robbins v. Scholastic Book Fairs*, 928 F.Supp. 1027, 1037 (D.Or.1996). Under section 1988, Plaintiff may recover those out-of-pocket expenses that "would normally be charged to a fee paying client."*Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir.1994).

Plaintiff seeks a total of $9,914.82 in litigation expenses. Included in this amount is $5,075.00 allegedly incurred by Plaintiff for an expert site inspection and report prepared by Joe Card. Mr. Card's report consists of two parts: a series of photographs documenting Rite Aid's alleged ADA violations along with a description of how each alleged violation may be remedied, and an architectural plan prepared by ADC Consultants. Mr. Card's invoice charges $1,050 for the portion of the report he himself prepared and $4,025 for the work done by ADC Consultants. The Court will allow the $1,050 charged for Mr. Card's services, but rejects the $4,025 claim for the architectural plans prepared by ADC Consultants.

Because Mr. Card did not draw the architectural plans that were the basis of his report, it is unclear whether Plaintiff would be able to authenticate those plans at trial.

No one from ADC Consultants was identified by Plaintiff as a trial witness, and Plaintiff has failed to indicate to the Court just how he intended to authenticate the architectural plans. More fatal to Plaintiff's claim, however, is the total lack of specifics regarding the nature of the charges incurred. While the Plaintiff is entitled to litigation expenses as the prevailing party, he carries the burden of establishing that such expenses were reasonably incurred. 42 U.S.C. § 12205. The portion of Mr. Card's invoice pertaining to the work done by ADC Consultants consists of a generic one-line reference and fails to indicate exactly what ADC Consultants was paid for, how the charges were computed, or how many hours were spent on the plans. The invoice additionally contains an unexplained 15 percent markup. As a result, there is no way to determine whether the charges claimed were reasonable, as they must be in order for this Court to direct that they be paid by Rite Aid.

Finally, Plaintiff claims an additional $4,839.82 in litigation expenses and costs. The Court finds these expenses reasonable, but notes that $2,119.50 of the amount requested was already claimed by Plaintiff in his Bill of Costs. That amount will not be awarded twice and will also be subtracted.

CONCLUSION

Based on the foregoing, Plaintiff is entitled to reasonable attorney's fees in the amount of $14,489.15 and reasonable litigation expenses in the amount of $3,770.32, for a total of $18,259.47. Plaintiff will accordingly be awarded that amount.[FN4]

FN4. Because oral argument would not be of material assistance, this matter was deemed suitable for decision without oral argument. E.D. Local Rule 78-230(h).

*6 IT IS SO ORDERED.

E.D.Cal.,2006.
Martinez v. Thrifty Payless, Inc.
Not Reported in F.Supp.2d, 2006 WL 279309 (E.D.Cal.)

END OF DOCUMENT

EXHIBIT E

White v. Sutherland
E.D.Cal.,2005.
Only the Westlaw citation is currently available.
United States District Court,E.D. California.
Sherie WHITE, Plaintiff
v.
J.A. SUTHERLAND, INC dba Taco Bell # 2463; Taco Bell Corporation; and Does 1 through 10, Defendants.
No. CIV S-03-2080 CMK.

May 6, 2005.

Lynn Hubbard, Law Offices of Lynn Hubbard III, Chico, CA, for Plaintiff.
Candace Marie Pagliero, Pagliero and Associates, Sacramento, CA, for Defendant.

ORDER

KELLISON, Magistrate J.
*1 On February 2, 2005, the parties entered into a consent decree, which dismissed plaintiff's claims for violations of the Americans with Disabilities Act, 42 U.S.C. § 12181 et seq. (hereinafter ADA) and California state law with prejudice. This proceeding is before the undersigned pursuant to Local Rule 72-301, in accordance with 28 U.S.C. § 636(a)(5) and (c).FN1

FN1. A review of the docket shows that only the defendants filed a consent to proceed before a magistrate judge. However, in his February 2, 2004 order of reassignment, Judge Garcia noted that the parties, in their written status reports, requested that this case be reassigned to a magistrate judge for all further purposes and recommended that the case be referred to the magistrate judge for all further proceedings and final entry of judgement. (Doc. 13.)

This matter is currently before the court on plaintiff's motion for an award of attorney's fees pursuant to provisions of the ADA and California law. The undersigned took this matter under advisement and decides the matter based on the papers and pleadings filed herein. Also before the undersigned are plaintiff's requests that the court take judicial notice of several orders from the Eastern District of California. The court grants plaintiff's request and takes judicial notice of these orders.

I. Background

Plaintiff, a quadriplegic who is unable to walk, stand and use her arms and requires use of an electronic wheelchair when in public, sued defendants on October 2, 2004, pursuant to the ADA and California law. Plaintiff alleged that she was discriminated against by unspecified architectural barriers and unspecified access violations at a Corning Taco Bell. The boilerplate complaint was framed in six causes of action: the first for injunctive and declaratory relief pursuant to the ADA.; the second for relief pursuant to the California Disabled Persons Act, Cal. Civ.Code §§ 54, 54.1, 54.3 & 55.; the third for relief pursuant to the state Unruh Civil Rights Act, California Civ.Code §§ 51 et seq.; the forth for relief pursuant to the state Health and Safety Act; the fifth for relief pursuant to the state Unfair Business Practices Act; and the sixth a state law negligence claim.FN2In addition to various forms of injunctive and declaratory relief, plaintiff sought $100,000 in general and special damages.

FN2. Judicial notice may be taken of court records. *Valerio v. Boise Cascade Corp.,* 80 F.R.D. 626, 635 n. 1 (N.D.Cal.1978), *aff'd,*645 F.2d 699 (9th Cir.1981.) A cursory review of court records reflect that counsel for plaintiff has filed over 450 disability rights cases in this court (with plaintiff filing approximately 51 of these cases) since 1998, and the complaint in this action is typical.

Prior to trial, plaintiff abandoned most of her state law claims, including the state civil and health and safety code injunctive relief claim, the negligence claim and the actual damages claim. (Doc. 17.) On the brink of trial, then the case settled, it was proceeding on injunctive relief claims pursuant to technical violations of the ADA and California law. (Docs. 17 & 26.)

On February 4, 2005, a consent decree was entered. Plaintiff received $4,000.00, plus reasonable costs and attorney's fees. She obtained specific injunctive relief in the form of defendant J.A. Sutherland, Inc.'s agreement to modify the "route of travel" to the Taco Bell specifically identified in exhibit A, excepting a portion referenced on page four within one year of notice and complete dismissal of the action. The court filed an order regarding plaintiff's cost bill on April 14, 2005. The present motion for attorney's fees is the only issue remaining to be determined in the case.

In short, keeping in mind that monetary success is not the only determinate of a successful lawsuit, the undersigned must decide whether, in an ADA case in which the record consent decree awarded plaintiff the statutory minimum damages of $4,000.00 and minor and relatively straightforward access improvements, it is reasonable to award $29,177.66 in attorney's fees.

II. Standards for Awarding Attorney's Fees

*2 The ADA, the Unrah Act and the California Civil Code provide for an award of attorney's fees to a prevailing party in a disability access action. 42 U.S.C. § 12205, Cal. Civ.Code §§ 52, 54.3, 55. The ADA allows the court "in its discretion" to award the prevailing party "a reasonable attorney's fees, including litigation expenses and costs."42 U.S.C. § 12205. The California Code of Civil Procedure section 1032, subdivision (b) entitles "a prevailing party ... as a matter of right to recover costs in any action or proceeding."Costs includes attorney fees when such fees are authorized by statute. (California Code of Civil Procedure § 1033.5, subd. (a)(4)(D), (10)(B) & (C)). The Unruh Act provides that an entity which discriminates in contravention of Section 51 is liable for "any attorney's fees that may be determined by the court."California Civil Code § 52(a). The court "possesses discretion to determine the amount of the fees, but not their entitlement."*Engle v. Worhtington,* 60 Cal.App.4th 628, 632, 70 Cal.Rptr.2d 526 (1997).

III. Discussion

Initially, the undersigned cannot help but observe that in every disability claim of which the undersigned is personally familiar, including this case, there is an implication made that the ADA has spawned a cottage industry of professional ADA plaintiffs.FN3 These plaintiffs make much, if not all, of their livelihood from entering public establishments in hopes of discovering a technical violation of the ADA in order that a lawsuit may be brought. Such lawsuits inevitably result in attorney's fees far in excess of any good done by the lawsuit as well as much financial hardship to the business enterprise, which is all to often a small, family owned franchise or establishment. Defendants argue that much of plaintiff's counsels' efforts were motivated by attempts to increase the cost of this litigation and not to advance the underlying goals of the ADA. Plaintiff counters that the agreement reached in this case achieved the goal of modifying defendants' restaurant, benefitting other patrons with disabilities, and that the award of attorney's fees provides incentive to file ADA lawsuits. However, the larger issue of whether the ADA has spawned a cottage industry of "shake-down" lawsuits out of all proportion to the initial aims of the ADA or whether it is a very necessary, if over-broad, mechanism to accomplish social justice is for the legislature, not the undersigned, to decide.

FN3. As previously noted, plaintiff's counsel has filed over 450 disability access suits in this District and at least fifty-one of those have been on behalf of the plaintiff in this case.

A. Prevailing Party

The first issue for decision by the court is whether plaintiff was the "prevailing party." FN4 Under the Supreme Court's test, " 'a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits plaintiff." ' *Fischer v. SJB-P.D.Inc.,* 214 F.3d 1115, 1118 (9th Cir.2000.)(citing *Farrar v. Hobby,* 506 U.S. 103, 111-12, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). " 'A material alteration of the legal relationship occurs [when] the plaintiff becomes entitled to enforce a judgment, consent decree or settlement against the defendant." ' *Id.* (citing Farrar 506 U.S. at 113, 113 S.Ct. at ----; *seealso,Barrios v. California Interscholastic Fed'n.,* 277 F.3d 1128, 1134 n. 5 (9th Cir.2002.) (stating that when parties enter into a judicially enforceable settlement agreement, the plaintiff is the prevailing party). A party can achieve "prevailing" status by establishing a "clear, causal relationship between the litigation brought and the practical outcome realized." *Rutherford v. Pitchess,* 713 F.2d 1416, 1419 (9th Cir.1983).

FN4. In her reply brief to defendants' opposition to plaintiff's motion for attorney's fees, plaintiff states that defendants dispute that she was a "prevailing party." Although the court believes that plaintiff is misconstruing defendants' argument-defendant is stating that plaintiff cannot claim to be a prevailing party by virtue of the parties' consent decree while simultaneously ignoring the provisions of the consent decree, which defendants argue, specifically exclude expert witness fees. However, to avoid any confusion, the court conducts an analysis of whether plaintiff is a prevailing party.

*3 Applying these standards to the facts of the instant case, it is clear that plaintiff is a "prevailing party." The consent decree entered into in this case requires defendants to make various modifications to the "route of travel" to the Taco Bell. Defendants have one year to make such modifications and should they fail to meet these obligations, plaintiff could return to court to force defendants to uphold their end of the consent decree. There is a clear and causal relationship between plaintiff's suit and defendants' modifications of Taco Bell. *Rutherford*, 713 F.2d at 1419. Because plaintiff has an enforceable agreement that requires defendants to do something that they otherwise would not be required to do, plaintiff is a "prevailing party." *Fischer*, 214 F.3d at 1118.

B. Reasonable Fees

Having determined that plaintiff is the prevailing party and therefore may be entitled to attorney's fees, the undersigned must calculate a "reasonable" fee award. This circuit uses the lodestar method of determining a reasonable attorney's fee award. *Widrig v. Apfel*, 140 F.3d 1207, 1209 (9th Cir.1998)(citing *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). The lodestar is calculated by multiplying the number of hours the prevailing party "reasonably" expended in the litigation by a "reasonable" hourly rate. *Id.*"After making that computation, the court assesses whether it is necessary to adjust the presumptively reasonable lodestar amount on the basis of the *Kerr*[FN5] factors that are not already subsumed in the initial lodestar calculation."*Morales v. City of San Rafael*, 96 F.3d 359, 364(9th Cir.1996). Among the subsumed factors presumably taken into account in either the reasonable hours component or the reasonable fees component of the lodestar calculation are: (1) the novelty and complexity of the issues, (2) the special skill and experience of counsel, (3) the quality of representation, (4) the results obtained and, (5) the contingent nature of the fee agreement. *Id.* at 364 n. 9.

FN5. The twelve *Kerr* factors bearing on reasonableness are:
(1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesireablity of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.
Kerr v. Screen Extras Guild, Inc., 526 F.2d 67 (9th Cir.1975).

Reasonable Hours Billed

As a preliminary matter, the undersigned notes that plaintiff's counsel bears the burden of supporting his request for fees and costs. *Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 112 (9th Cir.2000). Counsel here has "just barely" met the burden of supporting the attorney hours claimed by submitting a general eight page "slip listing" which, in very small print, lists in chronological order all hours spent by counsel and office personnel accompanied by a very general subject matter description. *Id.* As each page of the slip listing includes time expended by several different people, it appears that plaintiff's counsel expects the court or defense counsel to review the eight pages and breakdown and itemize the time expended by each of the persons identified, and then review the result to determine whether the hours claimed for each person are reasonable. The form of plaintiff's submission has made it very difficult and time consuming for the court to determine hours reasonably expended. Where documentation is lacking in detail, the court may either request additional documentation or reduce the fee to a reasonable amount. *Id;seealso,Zeffiro v. First Pennsylvania Bank*, 574 F.Supp. 443 (E.D.Pa.1983)(stating that the burden is on counsel to file adequately documented application for fees, detailing the time spent for each task and those who fail to meet that burden do so at their own risk). The undersigned has opted to reduce the hours, as explained below.

(1) *Excessive Time Expended*

*4 In arriving at the lodestar figure, the court should exclude hours that are "excessive, redundant, or otherwise unnecessary ..." *Hensley*, 461 U.S. at 434. The court need not scrutinize every entry in a slip listing and may instead check a sufficient number of entries to make reasonable calculations.*Evans v. City of Evanston*, 91 F.2d 473, 476-77 (7th Cir.1991)(upholding sampling procedure by the district court). The circuits have never requested that the district courts set forth an hour by hour analysis of fee requests when calculating the number of reasonable hours expended on a case. *U.S. v. Metropolitan Dist. Comm'n*, 847 F.2d 12, 16 (1st Cir.1988). Instead, when ascertaining hours reasonably expended, a trial court must make concrete findings and supply a "clear explanation of its reasons for the fee award."*Hensley,* 461 U.S. at 437;*seealso,McGinnis v. Kentucky Fried Chicken of California,* 51 F.3d 805, 809 (9th Cir.1995) (stating that a district judge need not make "rote recitation of the factors ... announced in *Kerr.*"Also helpful in the determination of reasonably expended hours are two other factors; overstaffing and the wide range of experience and skill among lawyers and (2) the complexity and novelty of the issues raised. *Cunningham v. County of Los Angeles,* 879 F.2d 481, 485 (9th Cir.1989).

Lynne Hubbard seeks attorney's fees for a total of 121.05 hours, which seems to be an unusually large amount of time given counsel's experience with disability access cases. Mr. Hubbard states that his normal billing rate for services performed in non-complex litigation is $300 per hour, although he has adjusted his hourly rate in this case to $250, implicitly conceding that the instant litigation was not complex. (Pl.'s Decl. filed Feb. 28, 2005 at 3:15-18.) Mr. Hubbard is an expert in ADA cases and has represented a large number of ADA plaintiff's. (*Id.* at 4:3-7.)He is accordingly intimately familiar with the cases and principles that govern litigation in this area, and should have had little or no trouble understanding the issues presented. Expertise presumably results in efficiency.

As an initial matter, the undersigned considers whether certain hours billed by Lynne Hubbard should be stricken as excessive billing. As explained below, the undersigned strikes the following attorney's fees. The court is particularly troubled that the slip list indicates a billing entry for $125 on April 29, 2004 for Lynn Hubbard for "disclosure of plaintiff's expert Joe Card."The timely disclosure of plaintiff's expert was vigorously disputed in this case. (*seee.g.* Def.s' Decl. filed March 25, 2005, Ex. 23.) During that dispute, Alisha Petras, one of Mr. Hubbard's paralegals, asserted in a letter to defense counsel that "[she] was responsible for serving experts on other parties" and that on April 29, 2004, she also designated experts. (Def.s' Decl. filed March 25, 2005 Ex. 22.) If Ms. Petras designated experts on April 29, 2004, there is no reason why Mr. Hubbard would also bill for this service. Accordingly, the $125 fee for 0.5 hours spent by Mr. Hubbard designating an expert is subtracted from the fee request.

*5 The court is also troubled by the $1,901.25 in fees generated by plaintiff's counsel over the disputed and undisputed facts in the proposed joint statement. On December 3, 2004, Lynne Hubbard billed $500 for services described as "proposed joint statement RE: undisputed and disputed facts."On December 7, 2004, there is a $15.00 charge for faxing the proposed joint statement to Scott Hubbard, a $26.25 charge for drafting a letter to defense counsel regarding Scott Hubbard's handwritten changes to the proposed disputed and undisputed facts, and a $350 charge for Scott Hubbard's review of and changes to the joint statement's disputed and undisputed facts. On December 9, 2004, Mr. Hubbard lists charges for again faxing Scott Hubbard the same document, his review of and another letter to defense counsel regarding Scott Hubbard's changes. On December 7, 2004 Lynn Hubbard billed $150 for reviewing a letter from defense counsel regarding the changes proposed by Scott Hubbard, and on December 8, 2004 Lynn Hubbard billed $250 for reviewing a letter from defense counsel regarding the changes proposed by Scott Hubbard. On December 9, 2004, there is a $250 charge for Lynn Hubbard reviewing a letter from defense counsel regarding the final version of the joint statement. On December 10, 2004, there are fees associated with faxing Scott Hubbard the same document and another letter to defense counsel regarding Scott Hubbard's changes.

Defense counsel disputes Lynn Hubbard's $500 fee for an activity described as "proposed joint statement re: undisputed and disputed facts," arguing that the document was prepared almost entirely by defense counsel. The fact that Scott Hubbard expended so much time reviewing and making changes to the document and the fact that defendant ultimately filed the document with the court support this contention. Accordingly, the $500 fee for Lynn Hubbard for 2 hours in an activity described as "proposed joint statement re: undisputed and disputed facts" is subtracted from the fee request. Its is somewhat unusual that Lynn Hubbard would bill for time spent reviewing letters from defense counsel in light of the fact that Scott Hubbard was the attorney apparently assigned to make changes to the joint statement. In short, the court finds that Lynn Hubbard's work was duplicative and subtracts his fees of $600 for 2.4 hours expended reviewing letters from defense counsel regarding the joint statement from the fee request. *McGinnis,* 51 F.3d at 808 (reducing fees for duplicative costs).

Subtracting 4.9 hours from Mr. Hubbard's fee request [FN6] leaves a request for fees for 60.5 hours. The undersigned next considers whether the remaining hours billed by Mr. Hubbard should be reduced by a percentage for vagueness, irregularity or excessiveness. Based upon spot-checking the slip listing, the vagueness of the time records submitted, and considering the expertise of plaintiff's counsel, Lynn Hubbard, and that this case did not present issues significantly different from the run-of-the-mill ADA case, the undersigned finds that 30% of his attorney's fees must be deducted from the lodestar for vagueness, irregularity or excessiveness. This deduction pertains to entries where more time was expended than was reasonably necessary to perform the task at issue, entries where time was expended by experienced counsel on matters typically handled by a less experienced attorney, entries where time was expended by paralegals on matters typically handled by less specialized office staff and entries that did not adequately inform the court about the task being performed.

FN6. As all the time subtracted from the fee request was at Lynn Hubbard's billing rate of $250, the court has subtracted those hours from the 65.55 hours @ $250/hr (leaving 60.65 hours @ 250/hr) requested by Mr. Hubbard instead of subtracting from the overall total number of hours.

*6 For example, it is unclear why Lynn Hubbard needed to spend one hour drafting the boilerplate complaint in this case, when it was identical, except for the names of defendants and the establishment, to the thirty others his client in this case had filed in this district. For the same reasons, the undersigned cannot understand why Mr. Hubbard would need six tenths of an hour to draft a fee agreement for plaintiff when he admits she is a regular client of his office. (Pl.'s Decl. filed February 22, 2005 at 6:12-15.) Mr. Hubbard also fails to explain why he billed for two separate site inspections, one on September 9, 2004 and another on July 27, 2004, especially in light of the fact that Mr. Hubbard retained an expert and charged for one hour on September 29, 2004 to review the "preliminary site report." Mr. Hubbard also spent a fair amount of time on paper administrative matters which would generally have been handled by a secretary or at least by a associate billing at a lower rate. Specifically, Mr. Hubbard logged two tenths of an hour on February 10, 2004 to review an order of reassignment and this was after his "legal assistants" had earlier that same day logged a commutative six tenths of an hour reviewing the same document. This same billing pattern was repeated on October 5, 2004.

The undersigned further finds that it is appropriate to deduct a percentage of the paralegal fees requested for vagueness, excessiveness or irregularity. For example, it is unclear why it was necessary to have Bonnie Vonderhaar and Alisha Petras, both paralegals who bill at a higher rate then clerical assistants, fax correspondence to various parties, including defense counsel and capital mail courier, especially in light of the fact that it generally took at least fifteen minutes to fax each document. Also mystifying is why Alisha Petras was charged with making a large bulk of phone calls required by this litigation. It is particularly illuminating that one such call was with defense counsel's secretary concerning available dates for plaintiff's deposition. If defense counsel's secretary could complete such a task for defense counsel, there is no reason why a secretary from Mr. Hubbard's office could not have performed the same function.

The court will not continue to scrutinize individual entries in the slip list, but based on the factors mentioned above, it will reduce by 30% the remaining 60.5 hours submitted by Lynne Hubbard for a total reduction of 18.15 hours; resulting in a total of 42.35 hours. The court will not reduce the hours of Scott Hubbard. Due to use of paralegals for functions traditionally performed by secretarial staff, and in light of the substantial attorney time expended, the court will reduce the 22.95 paralegal hours by 40% for a total reduction of 9.2 hours; resulting in a total of 13.75 hours. *See,e.g.,Missouri v. Jenkins,* 491 U.S. 274, 288 n. 10, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989) (stating that "purely clerical or secretarial tasks should not be billed at a paralegal rate.")

(2) *Degree of Success Achieved*

*7 Having determined the reasonable hours expended based on an excessiveness analysis, the undersigned must now consider whether the reduced hours remain justified based on the degree of success plaintiff achieved in this litigation. Originally, plaintiff sought $100,000 in general and special damages, punitive damages and various forms of injunctive relief. (Pl.'s Compl. at 16-17.) Plaintiff abandoned her actual and punitive damages claims and, in the settlement agreement, accepted the minimum statutory damages of $4,000 plus modification of the Taco Bell restaurant. That plaintiff received a relatively small amount of damages to settle the statutory damages claims is not necessarily fatal to finding that she achieved a level of success commensurate with the hours found thus far to be reasonable. "Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief."*City of Riverside v. Rivera,* 577 U.S. 561, 574 (1986). According to *Hensley,* however, there is no precise rule for making these determinations. *Hensley,* 461 U.S. at 436. Hensley states:

If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill.

Id.

The undersigned finds that the relatively small amount of statutory damages and the relatively minor specific injunctive relief detailed in the consent decree do not represent a significant or substantial degree of success on plaintiff's claims. Although civil rights cases undoubtedly may represent significant public benefit, the undersigned cannot conclude, in light of the numerous ADA and other disability rights litigation which has been filed in the federal courts, that the relief achieved by plaintiff (a sign, a grooved boarder along the top of the handicapped ramp and a slight widening of the shared access aisle between van accessible parking spaces) represents a significant victory in advancing disability rights or public awareness of those rights. While plaintiff's victory was more than "technical," *see,Fischer,* 214 F.3d at 1120 (discussing purposes of ADA litigation), plaintiff nevertheless achieved less than a significant degree of success in the terms documented in the consent decree. *Hensley,* 461 U.S. at 436.

Based on the foregoing discussion, the court further reduces all hours expended by plaintiff's counsel by 20%:
Lynn Hubbard(as reduced above to 42.35) reduced further by 20% = 33.9
*8 Scott Hubbard9.45 hours reduced by 20% = 7.56
Paralegals-13.75 hours (as reduced above) reduced further by 20% = 11

(3) *Rejection of Defendants' Rule 68 Offer*

Defendants contend that plaintiff's counsel's fees incurred after defendants' June 2004 settlement offer should be barred by Federal Rule of Civil Procedure 68's cost-shifting provision. Rule 68 provides that if the judgment finally obtained is less favorable than an earlier settlement offer, the offeree must pay the costs incurred after the making of the offer. In June of 2004, defendants offered to settle this case for approximately $13,000. At that time, most of the violations listed in the complaint had already been corrected by defendants. Plaintiff ultimately accepted $4,000 to settle the case and defendants agreed to make some relatively minor additional modifications. In the seven months between the settlement offer in June and the settlement agreement in January, plaintiff incurred approximately $10,000 in fees.

However, under the plain language of Rule 68, costs are only shifted when the statute authorizing the collection of fees defines fees as an item of costs, such as 42 U.S.C. § 1983 & 1988. *Marek v. Chesney,* 473 U.S. 1, 9, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985). The ADA provides that a prevailing party may be awarded a "reasonable attorney's fee, including litigation expenses and costs."42 U.S.C. § 12205. This provision does not define costs to include attorney's fees. Accordingly, the undersigned declines to apply Rule 68's cost-shifting analysis to plaintiff's fee request.

Reasonable Hourly Rate

Having determined the number of hours reasonably expended, the court next turns to a determination of a reasonable hourly rate. Whether a requested hourly rate is reasonable normally must be established by the attorney claiming fees, who should submit affidavits and other evidence tending to show that the requested rates are in line with those of lawyers of reasonably comparable skill, experience and reputation. *Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). Prevailing market rates in the relevant legal community determine whether the requested hourly rate is reasonable. "[T]he choice of a relevant community and the prevailing rate in that community are crucial to establishing the amount of attorney's fees granted."*Barjon v. Dalton,* 132 F.3d 496, 500 (9th Cir.1997). The court's first task is to determine the applicable legal community from which the comparable rates are to be applied.

The undersigned finds that the rate of $250 per hour adequately reflects the prevailing market rate in this district for an experienced attorney in an ADA case. Accordingly, the court will compensate Lynn Hubbard, an experienced disability rights litigator, a fee computed at the rate of $250 per hour.

Moving down from that figure, the undersigned considers the appropriate rate for compensation of Scott Hubbard, an associate attorney with the Hubbard law firm. In his declaration supporting his motion for attorney's fees, Lynn Hubbard states that "for this case, [he] charged $175 per hour for [Scott Hubbard's] services. (Pl.'s Decl. filed February 28, 2005 at 4:21-25.) As a basis for this rate, Mr. Hubbard states that Scott Hubbard "is recognized as an expert in ADA law by two district judges" in this District. *Id.* In his reply brief in support of his motion for attorney's fees and costs, Mr. Hubbard states that "the basis of [his request to raise Scott Hubbard's rate from $150 to $175] is simple-Scott Hubbard has discussed state and federal disabled access laws ... with this court on three separate occasions and demonstrated his firsthand knowledge of both."(Pl.'s Reply Brief at 6:5-9.) Mr. Hubbard goes on to state that "[Scott] Hubbard will gladly accept an hourly rate commensurate with other associate lawyers ($150) if the court knows of (or has seen) any other party, attorney, or expert witness with greater knowledge of disabled access law and Eastern District Practice. If the court is unable to do so, Mr. Hubbard would ask that the court increase his hourly rate to a figure that reflects his knowledge, expertise, and skill ($175)."(*Id.* 6:11-15.)

*9 As previously noted, whether a requested hourly rate is reasonable normally must be established by the attorney seeking the fee. Blum, 465 U.S. at 896. A reasonable attorney fee is one that is adequate to attract competent counsel but does not create a windfall to attorneys. *Id.* Therefore, the critical inquiry is whether a "paying client" would pay the rate of $175 to Scott Hubbard. *Davis v. City of San Francisco,* 976 F.2d 1536, 1545 (9th Cir.1992). Generally, to aid the court in making this determination, the attorney produces satisfactory evidence, in addition to his own affidavits, that this in indeed the market rate. *Blum,* 465 U.S. at 896 n. 11. Here, Mr. Hubbard has provided no evidence to assist the court other than his own conclusory statements. It is Mr. Hubbard's responsibility to justify to the court the increase of Scott Hubbard's fee award. It is not, as Mr. Hubbard suggests, the court's responsibility to justify declining to increase his fee. Eastern District Judges have repeatedly found that the reasonable rate in the Eastern District for an associate is $150 per hour. *See,e.g.,Loskot, et al. v. Pine St. Sch.,* 00-2405 DFL JFM, *O'Campo v. Thrifty Payless, Inc., et al.,* 02-0511, *but see,Hubbard v. Twin Oaks Health and Rehabilitation Center,* 03-0725 LKK CMK (awarding Scott Hubbard $175 per hour for two hours of work, where there was no challenge to the $175 per hour rate). The undersigned finds that no reasonable economic evidence has been submitted to justify an increase in Scott Hubbard's fees. Accordingly, the court compensates Scott Hubbard at a rate of $150 per hour.

The undersigned next considers defendants' challenge to the rate of $65 per hour charged for "legal assistants." Defendants contend that Hubbard office improperly seeks to recover for secretarial services-tasks such as creating client files, reviewing and updating calendars, reviewing and updating files and telephone calls between secretaries. Plaintiff responds that the Ninth Circuit and the United States Supreme Court have allowed attorneys to bill separately for paralegal time, clerical work and secretarial time under 42 U.S.C. § 1988. (Pl.'s Reply Brief at 11:5-7.) Plaintiff also cites several Eastern District Cases which she states support an award for fees for clerical staff in ADA cases. (*Id.* at 11:9-12, citing *Loskot, et al., v. Pine St Sch, et al.,* 00-2405 DFL JFM.). Plaintiff's counsel has provided detailed descriptions of the qualifications of five persons [FN7] who are "legal assistants" in his office. While their qualifications are impressive, none of the five have any specialized legal training and from the descriptions, perform work that would be characterized as secretarial.

FN7. The court notes that in Lynn Hubbard's original declaration in support of his motion for costs, he only lists three "legal assistants"-Crista Duncan, Jamie Stagner and Melinda Adams. (Pl.'s Decl. 5:8-22.) In his reply brief, Mr. Hubbard, lists two additional legal assistants, MeLisa Dodson and Elva Garcia, leaving the court to wonder why these two were not mentioned in his original declaration. (Pl.'s Reply Brief at 11:25-28-12:1-24.)

In *Missouri v. Jenkins,* 491 U.S. 274, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989), the Supreme Court stated that it would hardly be in "accord with Congress's intent to provide a 'fully compensatory fee' if the prevailing plaintiff's attorney in a [42 U.S.C. § 1983] civil rights lawsuit were not permitted to bill separately for *paralegals,* while the defense attorney in the same litigation was able to take advantage of the prevailing practice and obtain market rates for such work."*Id.* at 287 (emphasis added). However, in response to Missouri's "slippery slope" argument that compensation for paralegals at rates above cost would lead to attorney's next trying "to bill separately-and at a profit-for such items as secretarial time, paper clips, electricity and other expenses," the Court stated that attorney's seeking fees under § 1988 would have no basis for such expenses unless this were "the prevailing practice in the local community."*Id.* at 287 n. 9. The Court further stated that "the safeguard against the billing at a profit of *secretarial* services and paper clips is the discipline of the market."*Id.* (emphasis added).

*10 Plaintiff's counsel has made no showing that it is the prevailing practice in the local community to bill, at a profit, for secretarial tasks. The court has carefully examined the three cases cited by Plaintiff in support of her contention that the Eastern District has awarded fees for clerical staff in ADA cases. The undersigned notes that in *Loskot et al. v. Pine St. Sch., et al.,* 00-2405 DFL JFM, Judge Levi awarded $125 dollars for clerical staff. It is not clear from the order the number of hours expended or the billing rate for the clerical staff. In *Pickern, et al. v. Marino's Pizza & Italian Restaurant, et al.*, 01-1096 WBS GGH, Judge Shubb awarded plaintiffs $405.00 for paralegal costs, but made no award for clerical staff.FN8 In *Feezor v. Comfort Inn Vallejo*, 03-0540 LKK PAN, Judge Karlton ordered that the court would allow $580 in fees for "paraprofessionals." The undersigned cannot determine whether "paraprofessional" is to mean paralegal or paralegals and secretarial staff. In any case, it is not clear from the three cases cited by plaintiff that the prevailing practice in this district is to award fees for secretarial work. *Seealso,Hubbard v. Twin Oaks Health and Rehabilitation Center*, 03-0725 LKK CMK (stating although defendant objected to certain costs as secretarial in nature, the court would not "scrutinize each of the 171 entries pointed to by defendant to determine which of them are secretarial in nature and therefore, not recoverable as alleged by defendant.") Indeed, the $125 allowed for clerical staff costs in the aforementioned orders differs greatly from the $1,404 in "legal assistant" fees that plaintiff seeks in this action.

FN8. This differs somewhat from the findings and recommendations filed by Judge Hollows on October 1, 2002. In the findings and recommendations, Judge Hollows notes that plaintiffs sought $125 for clerical staff, but (which was listed under paralegal fees, for a total of $562 in paralegal fees) and recommended awarding $562 for paralegal fees.

The tasks performed by the legal assistants include reviewing and updating the calendar regarding notice of taking plaintiff's deposition. This task took fifteen minutes and cost $19.50. A spot-check of the slip list reveals that, in general, every update of the calendar took fifteen minutes and cost $19.50. The undersigned cannot find that the legal market in this area would bear such a cost. Missouri, 491 U.S. at 287 n. 9. Plaintiff has produced no evidence which supports that such an award is the prevailing market rate. United Steel Workers of America v. Phelps Dodge Corp., 896 F.2d 403, 407 (9th Cir.1990) (stating that affidavits of plaintiff's attorney regarding prevailing fees in the community and rate determinations in other cases are satisfactory evidence of the prevailing market rate). In fact, given the large amount of attorney time claimed as well as the large amount of time expended by paralegals, the fee request for the clerical work of legal assistants serves to "spiral the cost" of disability rights litigation, which cannot have been Congress's intent in providing for attorney's fees in he statute. *See,e.g.,*Cameo Convalescent Center, Inc. v. Senn, 738 F.2d 836, 846 (7th Cir.1984)(cert. denied 1985)(stating that reducing the spiraling costs of civil rights litigation furthers the policy underlying the civil rights statutes). As plaintiff has not shown that billing, at a profit, for secretarial time is the prevailing practice in the local community, the undersigned declines to make such an award here. The $1,404 requested for "legal assistants" performing tasks which are secretarial in nature is subtracted from the fee request.

*11 As there has been no challenge to the paralegal rate of $75 per hour, the undersigned accepts that rate.

Lodestar Calculation

Based on the foregoing analysis and calculations, the lodestar calculations is as follows:

Lynn Hubbard- 33.9 hours x $250/hr	=	$8,475.00
Lynn Hubbard-1.5 hours travel x 150/hr [9]	=	$225.00
Paralegals- 13.75 hours x $65/hr	=	$893.75
Total: $9,593.75		

FN9. The parties agree that Lynn Hubbard's hourly rate for travel should be reduced to that of an associate attorney; $150 per hour. (Pl's Reply Brief at 6:17-18.)

C. Litigation Expenses and Costs

As a preliminary matter, the undersigned notes that plaintiff filed a bill of costs on February 8, 2005, and on April 14, 2005 the court filed an order allowing costs of $599.49 pursuant to 28 U.S.C. § 1920 and Federal Rule of Civil Procedure 54(d). *Seealso,* L.R. 54-292. In this motion, plaintiff seeks an additional $7,748.66 in litigation expenses and costs. Of the litigation expenses and costs, the bulk, $5,100.62, is for fees of expert Joe Card of JPC Contracting. The remainder of the costs are for court fees, process servers, court reporters, courier/overnight mail and other litigation expenses.

The ADA authorizes an award of expert witness fees to the prevailing party. *Lovell v. Chandler*, 303 F.3d 1039, 1058 (9th Cir.2002). The instant case presents a unique circumstance-plaintiff is seeking to recover fees for an expert that defendants contend was never properly disclosed. At the time the case settled, defendants had an outstanding motion in limine seeking to preclude plaintiff's expert, Joe Card from testifying on the grounds that he was timely disclosed. Settlement of the case precluded the court's decision on this issue.

The Status Order filed on February 10, 2004 ordered the plaintiff to "designate in writing and file with the court, and serve upon all other parties, the names of all experts that they propose to tender at trial not later than June 24, 2004."(Doc. 14 at 3:4-7.) A review of the docket sheet shows that plaintiff did not designate Joe Card by the June 24, 2004 deadline. Only on December 2, 2004, did plaintiff designate Joe Card as an expert witness. Therefore, the undersigned finds that Joe Card's testimony would not have been admissible at trial. To allow plaintiff to recover the fees for an exert witness who was not properly disclosed would contravene the ADA's goal of allowing recovery of reasonable attorney's fees. In determining how other elements of attorney's fee is calculated, a district court should look to the marketplace to determine what is reasonable. *Missouri,* 491 U.S. at 285. The undersigned cannot imagine that an attorney billing a private client would include the cost for an expert who could not be used at trial due to the failure of the attorney to properly disclose the expert. Allowing such a recovery by virtue of a settlement would be entirely inappropriate. Accordingly, the cost of $5,100.00 for expert witness Joe Card will be disallowed.

***12** The undersigned next considers the remaining litigation expenses requested by plaintiff. Plaintiff divides these expenses into court fees, process servers, court reporters, courier/overnight mail and "other litigation expenses." In her February 8, 2005 bill of costs, plaintiff requested $150.00 for court filing fees, $64.00 for service of summons and subpoena and $630.39 for fees of the court reporter, (doc. 45 at 1) and the court considered and ruled on these requests in its April 14, 2005 order taxing costs. Plaintiff now requests these same expenses in the instant motion as "litigation expenses." (Decl. of Lynn Hubbard filed February 28, 2005 at 6:2-5.) Accordingly, the undersigned disallows the request for $150 for court fees, $64 dollars for service of summons and $630.39 for court reporters. Plaintiff requests $1,655.33 for "other litigation expenses" and directs the court's attention to exhibit C to Lynn Hubbard's February 28, 2005 declaration in support of costs for itemization. (Decl. of Lynn Hubbard filed February 28, 2005 at 6:5-6.) However, Mr. Hubbard fails to provide any support for these requests. *Seee.g.,* L.R. 54-292(b) (stating that a cost bill shall be accompanied by an affidavit from counsel that the costs claimed are allowable by law, are correctly stated and were necessarily incurred.) The very vague descriptions of the "other litigation expenses" provided in the itemized list are not enough to allow the court to determine whether such expenses were necessary or allowable by law. Accordingly, the $1,655.33 for "other litigation expenses" is disallowed.

Finally, the undersigned considers plaintiff's request of $148.82 for courier/overnight mail. The expense for courier/overnight mail is itemized in Exhibit C to Lynn Hubbard's February 28, 2005 declaration in support of costs. However, the descriptions of the expense in the itemized list is too vague for the undersigned to determine whether such expenditures were reasonably necessary to this litigation. *Seee.g.,* L.R. 54-292. For example, the itemized list reveals a cost of $45.00 for "courier filing to court" on January 21, 2004. However, a review of the court's docket sheet does not indicate any filings by plaintiff near that date.[FN10] Similarly, a review of the court's docket does not reflect any filing by plaintiff on or near December 17, 2004, although she claims a cost of $45.35 for "courier filing to the court." Accordingly, the $148.82 requested for courier/overnight mail is disallowed.

FN10. The docket indicates that on 1/22/04 defendants filed a status report and a discovery plan. However, plaintiff filed nothing with the court on or around 1/21/04. Her closest filing was a status report which was filed on 1/13/2004.

IV. Conclusion

IT IS ORDERED for the reasons set forth above, plaintiff is awarded attorney's fees in the amount of $9,593.75. Her request for additional litigation expenses and costs is denied.

E.D.Cal.,2005.
White v. Sutherland
Not Reported in F.Supp.2d, 2005 WL 1366487 (E.D.Cal.)

END OF DOCUMENT